Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DONALD MINNIECHESKE AND
JOANN REDMAN

Petitioners

v.

SHAWANO COUNTY

On Petition For Writ Of Certiorari
To The Supreme Court
of the State of Wisconsin

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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I. WHETHER PRINCIPLES OF DUE PROCESS DEMAND THAT A FORECLOSURE JUDGMENT TAKING 580 ACRES OF PROPERTY BE DECLARED VOID WHEN IT IS UNDISPUTED A MORTGAGE-HOLDER WAS NEVER PROVIDED NOTICE OF THE FORECLOSURE PROCEEDING, DESPITE THE FACT STATE COURTS HAVE EXAMINED THIS ISSUE NUMEROUS TIMES AND RULED AGAINST THE PETITIONERS, BECAUSE NOT ONCE DID THE COURTS REACH THE MERITS OF THE PETITIONERS' CLAIMS.

II. WHETHER THE PETITIONERS' DUE PROCESS RIGHTS TO A DETACHED AND NEUTRAL MAGISTRATE WERE VIOLATED WHEN THE JUDGE WHO PRESIDED OVER THE FORECLOSURE PROCEEDING, AND SUBSEQUENTLY THWARTED THE PETITIONERS' EFFORTS TO HAVE THEIR CLAIMS ADJUDICATED, WAS AN OWNER OF, LIENHOLDER ON, OR INTERESTED PARTY IN, THE PROPERTY IN QUESTION.

III. WHETHER THE STATE STATUTE USED TO TAKE THE PETITIONERS' PROPERTY, WHICH WISCONSIN COURTS HAVE INTERPRETED AS ALLOWING THE GOVERNMENT TO RETAIN ALL EXCESS PROCEEDS ABOVE AND BEYOND THE DELINQUENCY WHICH GAVE RISE TO THE FORFEITURE, VIOLATES THE PETITIONERS' RIGHTS UNDER THE DUE PROCESS AND TAKINGS CLAUSES, AS WELL AS THE SUPREMACY CLAUSE, OF THE UNITED STATES CONSTITUTION.

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CITATION OF OPINIONS AND ORDERS ENTERED

Wisconsin Supreme Court Order:

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Shawano County v. Minniecheske, Case No. 01-1997 (April 16, 2002) (See Appendix B).

Shawano County v. Redman, et al, Case No. 95-2938 (September 24, 1996) (See Appendix D).

In re the Finding of Attorneys Fees in Life Science Church, et al, Case No. 98-0610 (May 4, 1999) (See Appendix E).

In re Foreclosure of Tax Liens: Shawano County v. Minniecheske, Case No. 98-2090 (May 4, 1999) (See Appendix F).

Trial Court Findings And Order Amending Judgment:

Order Denying Relief, Case No. 86-CV-0 (Shawano County Circuit Court, February 28, 2001) (See Appendix C).

STATEMENT OF JURISDICTION

The Wisconsin Supreme Court order denying the Petitioners' petition for review, from which the petitioner now seeks review, was entered on July 26, 2002. There have been no rehearings or extensions of time to file this petition.

The petitioner believes this Court's jurisdiction to review on a writ of certiorari the order in question is conferred by 28 U.S.C. §1257(a).

This Court should also note that this Petition draws into question the constitutionality of Wisconsin regulations and accordingly, 28 U.S.C. §2403(b) may apply. Therefore, three copies of this Petition will be served upon the Attorney General for the State of Wisconsin, as well as counsel for the County.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Constitutional Provisions:

Article VI, of the United States Constitution

Fifth Amendment to the United States Constitution

Fourteenth Amendment to the United States Constitution

Statutes:

Wisconsin Statute §806.07

Wisconsin Statute §801.58

Wisconsin Statute §75.521

STATEMENT OF THE CASE

This is an appeal from an order of the Wisconsin supreme court denying a petition for review filed by Donald Minniecheske and Joann Redman (hereinafter, the petitioners). (App. A). The decision from which the petitioners sought review was a summary disposition by the Wisconsin court of appeals holding the petitioners' claims, having been previously reviewed in a prior appeal, barred by the doctrine of claim preclusion.[1] (App. B). That appeal was taken from a trial court order, rendered without a hearing, and holding the claims barred and prohibiting the petitioners from commencing any additional litigation. (App. C).

To fully appreciate the merits of this petition, one must first understand the odyssey during which the petitioners steadfastly attempted, only to be repeatedly thwarted, to obtain a ruling on the merits of whether the procedure by which their property was taken was constitutional. The seeds of this case were sown in 1987 when Shawano County filed an *in rem* action to foreclose 580 acres of undeveloped northwoods property owned by Donald Minniecheske for allegedly failing to pay real estate taxes. The *in rem* document, entitled "Petition and Notice and List of Tax Liens of Shawano County being Foreclosed by Proceeding In Rem 1997," named as an owner, interested party or lienholder on the property in question, Judge Earl Schmidt of Shawano County.

Before a judge had been assigned to the state foreclosure action, however, the *in rem* proceeding was stayed by a federal court which had taken jurisdiction of a forfeiture action involving the same property. The forfeiture action alleged that Minniecheske had failed to pay gift taxes after gifting the

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[1] In Wisconsin, the doctrine of *res judicata* is known as the doctrine of claim preclusion. *See, Northern States Power Co. v. Bugher*, 525 N.W.2d 723, 727 (1995).

property to his daughter, Joann Redman. On August 1, 1989, the federal court ordered foreclosure of the property. However, at the ensuing foreclosure proceeding, the County accepted a sale of the property from Minniecheske to Joseph Lehman who paid all of the back taxes owing.[2]

Despite resolution in federal court, the County continued to pursue the tax foreclosure action in state court. On November 20, 1990, Redman received correspondence advising her for the first time that Judge Earl Schmidt had been assigned to preside over the County's foreclosure action. Accordingly, on November 28, 1990, Redman, acting *pro se*, filed a request for substitution of judge alleging, *inter alia*, that Judge Schmidt had a conflict of interest because he was an interested party on the subject property and therefore should recuse himself.[3] Judge Schmidt, however, took no action on the request.

It was not until a June 29, 1992, hearing that the tax foreclosure action was initially resolved when Judge Schmidt entered a default judgment in favor of the County. Neither notice of that hearing, however, nor subsequent entry of the

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[2] Following approval of the sale, the County subsequently moved to vacate the order arguing its attorney did not have authorization to acquiesce in the sale to Lehman. The federal court rejected the request. This is noteworthy because the petitioners were frequently maligned throughout the proceedings below for dredging up what was perceived as irrelevant history whenever they provided a historical context such as this one to support their position that the County's true motive was always to take their land at an unconscionably low price rather than collect unpaid taxes.

[3] Wisconsin Statute §801.58 also provides for a substitution of judge as a matter of right. (App. H). Under Wisconsin Statute §801.58, a new judge must be assigned if a plaintiff requests a new judge within 60 days of the filing of the Summons and Complaint or if a defendant requests a new judge within 60 days of service of process upon him. (*Id.*). There was no demonstration that a Summons and Complaint was ever filed or served in this matter to commence the tolling of this limitation.

default judgment, was ever sent to Redman. Therefore, on September 8, 1992, the petitioners filed a new civil action asking that the default judgment be reopened pursuant to Wisconsin Statute §806.07 on the grounds they never received notice of the June 29, 1992, hearing. (App. I). The County responded by seeking entry of a new foreclosure judgment. On December 29, 1992, Judge Schmidt held a hearing and did reopen the default judgment. However, refusing to give Redman an opportunity to obtain counsel, he then immediately rendered judgment in favor of the County, this time presumably on the merits.

Unfortunately, not until February 1, 1993, was the judgment reduced to writing, signed by Judge Schmidt, and entered by the clerk of courts. However, for reasons never made entirely clear, the written order was not placed in the court file and therefore, there was no written order of record from which the petitioners could appeal. Accordingly, on March 11, 1993, when Redman filed a motion to vacate the judgment, she referenced the court's December 29, 1992 oral judgment. Remarkably, that motion was still pending when, on January 13, 1995, the Village of Tigerton filed a small claims action to remove Redman and others from the property.[4] The County subsequently moved for summary judgment on the grounds it had already been adjudicated the exclusive owner of the property.[5]

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[4] After foreclosing on the property, the County had transferred the property to the Village of Tigerton.

[5] To support the idea it had been previously adjudicated the owner of the property, the County relied not on the order allegedly rendered on the merits on December 29, 1992, and entered on February 1, 1993, but instead, on the June 29, 1992, default judgment which had later been reopened. The only reasonable inference to be drawn from this *faux pas* is that when the County examined its file and the court file to prepare its summary judgment motion, neither contained a copy of the February 1, 1993 written order.

On May 1, 1995, Redman amended her March 11, 1993 motion to vacate. (App. D). Among the claims raised by Redman was that the foreclosure judgment was void because the County failed to give adequate notice of the foreclosure proceeding to Orlando Richards, who was a lienholder and a mortgage holder on the property, and Marcella and Delores Lehman, who were lienholders on the property. (*Id.*). On September 13, 1995, the trial court denied her motion without a hearing. (*Id.*). In the meantime, the court granted the County's summary judgment motion, largely on the basis of the judgment in the previous foreclosure action. The petitioners, acting *pro se*, appealed this decision to the Wisconsin court of appeals. (*Id.*).

On September 24, 1996, the Wisconsin court of appeals affirmed. *See Shawano County v. Redman*, Appeal No. 95-2938 (September 24, 1996). (App. D). In *Redman*, the appellate court concluded that because the petitioners did not appeal from the February 1, 1993, judgment, it did not have jurisdiction to consider her claim that her request for substitution of judge was improperly denied. (App. D, pp. 3-5). It further noted the petitioners did not adequately develop this issue from a factual standpoint before the trial court. (*Id.* at 4). The court of appeals then stated that the petitioners' belief that the February 1, 1993, judgment had been "backdated" in September of 1995 was not only unproven, it was improbable.[6] (*Id.* at 5).

Despite acknowledging the absence of a record on the issue, and already having disposed of the issue for lack of jurisdiction, the court of appeals continued and, in what can only be described as dicta, briefly discussed the "merits" of the

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[6] As noted earlier, the likely explanation for the belated appearance of the February 1, 1993, written judgment is not that it had been backdated, but instead, that it somehow became separated from the court file. However, this issue was never addressed by the court of appeals because, as it observed, it had no factual record before it.

petitioners' claim that the foreclosure judgment was void for the County's failure to give notice of the proceeding to various lienholders. (*Id.* at 8-10). *Redman* disagreed with the idea that "lienholders" Richards and the Lehmans were not given proper notice of the foreclosure, reasoning that "lienholder" Richards received notice by publication and that the statute of limitations had expired on the Lehmans' claim. (*Id.*). *Redman* was not, however, dispositive of the claim that because Richards was not merely a "lienholder," but also a "mortgage" holder whose address was on file, a *sine qua non* of a valid foreclosure judgment was that notice be mailed to that address and an affidavit stating that fact be filed. *See* Wisconsin Statute §75.521(3)(c). (App. G).

It was against this backdrop that on April 19, 1996, the petitioners filed an action naming the County, the Village, Richards, the Lehmans, and others as defendants.[7] The complaint demanded, *inter alia*, that the court void the foreclosure and restore title to the petitioners. The central claim advanced by the petitioners was that because Richards was a mortgage holder of record who did not receive notice of the foreclosure proceeding, the foreclosure judgment was void *ab initio*, the decision in *Redman* notwithstanding. Thereafter, various lienholders filed cross-claims and/or third-party complaints against the County and the Village.

On May 10, 1997, the Village moved to dismiss the complaint alleging, *inter alia*, that the petitioners were barred by the doctrines of issue and claim preclusion. To support its motion, the Village argued that in addition to the original foreclosure action, in which the County took title to the property, two other actions directly impacted the case:

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[7] It should be noted that this action was commenced in the name of Life Science Church, also an owner of the property in question.

(1) An eviction action by the Village against Donald Minniecheske and others;

(2) A small claims action which, the Village argued, contained causes of action identical to those currently before the court.

The Village also requested actual costs and attorneys fees from the petitioners and their attorney, alleging the complaint was frivolous.

On May 29, 1997, a hearing was held to address pending motions. At that hearing, the court inquired, *inter alia*, why Richards had been joined as a defendant. The petitioners' attorney explained that Richards had an interest in the outcome of the proceeding, albeit not one adverse to that of the petitioners. When asked why he was a necessary party, the petitioners' attorney indicated there had been improper service in the foreclosure action and a timely request for substitution of judge which no court had ever denied or granted. At this point, new counsel for the petitioners distilled the issues pending before the court:

> Both sides have indicated . . . they want to raise certain legal issues that don't appear to be significant factual disputes, and perhaps it could be raised in the context of offsetting motions for summary judgment. I would anticipate the other side over here (indicating) to raise the issue that this foreclosure judgment cannot be collaterally attacked, and that's a matter that both parties must research and present the lot (sic) and basic facts to the Court.

Thereafter, petitioners' counsel observed that both the substitution of judge issue and the inadequate notice issue would naturally be disposed of by a summary judgment decision determining ownership of the property and that all other issues

should be put on hold. Both the Village and the County immediately agreed.

The trial court dismissed the claims against the Lehmans and Richards, and accordingly, all of their motions. The court then denied all of the remaining motions. The trial court then ordered the matter be clarified through a summary judgment motion and ordered the parties to submit briefs. On July 28, 1997, the County formalized the posture ordained by the court by moving for summary judgment, raising, *inter alia*, the doctrines of claim and issue preclusion.

The petitioners' documents opposing summary judgment posited that due process deficiencies in the original foreclosure process rendered the tax foreclosure judgment void. The petitioners noted that Richards, a lienholder and mortgagee of record, was never provided notice of the foreclosure action by certified mail as required by Wisconsin Statute §75.521 and relied on the reasoning set forth in *In Matter of Foreclosure of Tax Liens v. Young*, 316 N.W.2d 362 (Wis. 1982) (absent strict compliance with notice provisions, it would violate due process to allow such a governmental taking). The petitioners also noted the court's earlier failure to honor a timely judicial substitution request deprived the court of jurisdiction, rendering its eventual judgment void. The petitioners noted a void judgment can be collaterally attacked and expunged at any time, relying on the reasoning of *Neylan v. Vorwald*, 368 N.W.2d 648, 655 (Wis. 1985). The petitioners noted the failure to strictly comply with procedural requirements on the tax foreclosure, most notable of which was a failure to notify a mortgage holder of the proceeding, rendered the foreclosure constitutionally infirm and therefore void. Because the judgment was void, the petitioners observed they were not precluded from collaterally attacking it.

On October 31, 1997, the trial court notified the parties it would grant the defendants' motion for summary judgment. On November 18, 1997, the trial court issued its decision from the

bench. It did not reach the merits of the petitioners' claims, but instead, relied on the doctrine of claim preclusion. The court acknowledged the small claims judgment upon which it was relying for claim preclusion, had itself been based on claim preclusion because of an earlier action. Rather than attaching any significance to that peculiarity, the court simply noted that insofar as claim preclusion is meant to draw a line between a meritorious claim and a vexatious, repetitious and needless claim, the action should be dismissed.[8]

On March 9, 1998, Minniecheske personally commenced an appeal. *Life Science Church v. Shawano County*, 585 N.W.2d 625 (Wis. App. 1998). However, this was problematic because the underlying action had been prosecuted in the name of the Life Science Church. Because the actual aggrieved party below had been an entity (i.e., Life Science Church), and because Minniecheske was not a licensed attorney, the court of appeals concluded the notice of appeal was ineffective to initiate a valid appeal and therefore, had to be dismissed. *Id.* at 627-29. Once again, the petitioners were foiled in their attempt to have their

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[8] The court then turned to the defendants' claim for attorneys fees. New counsel for the petitioners explained why it would be inappropriate to assess attorneys fees against him, noting that before his involvement, the petitioners had not presented their claims in an orderly manner. He observed that one of his first acts was to drop some claims which lacked a reasonable basis in the law and described how, pursuant to the court's order, he researched and briefed the various issues. The trial court agreed and did not assess attorneys fees against petitioners' counsel.

On December 12, 1997, nearly four weeks later, the proposed written order had still not been forwarded to the court when unexpectedly and inexplicably, the trial court did an about-face and issued a supplemental decision wherein it decided it would impose sanctions against the petitioners' attorney after all. This order was ultimately reversed by the Wisconsin court of appeals. *In Re The Finding of Attorneys Fees in Life Science Church, et al v. Shawano County et al*, No. 98-0610 slip op. (Wis. Ct. App. May 4, 1999) (App. E).

procedural due process challenge to the foreclosure action decided on the merits.[9]

On October 19, 2000, the petitioners, again acting *pro se*, filed the action which led directly to this petition. Between December 27, 2000, and February 27, 2001, the petitioners filed supplementary materials to their motion. Ultimately, the petitioners requested a Writ of Coram Nobis seeking the following relief:

> Vacate the Judgment of Foreclosure Dated Feb. 1, 1993 and vacate the June 17, 1995 Judgment of Foreclosure which was entered without jurisdiction and are VOID based on the Supremacy Clause of the United States Constitution.

(Emphasis in original).

In support of their action, the petitioners relied on several legal arguments. First, the petitioners posited that Wisconsin Statute §75.521, as applied in this case, was unconstitutional and in violation of the United States Supremacy Clause, insofar as it was used to seize the petitioners' property without requiring just compensation. Second, the petitioners noted that the foreclosure action was void insofar as a mortgage holder Richards never received any notice of the action.[10] Third, the petitioners noted that when they filed a timely notice and

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[9] The petitioners also attempted, on June 3, 1998, to petition the trial court for relief, said motion being denied, without a hearing, on June 4, 1998. (App. F). A subsequent appeal was summarily affirmed on the grounds the issues had already been disposed of in the appellate court decision in *Redman* and therefore were barred by the doctrine of claim preclusion. (*Id.*).

[10] The complaint noted that on February 18, 1998, Richards had legally conveyed to Minniecheske his mortgage and all rights pursuant thereto. Thus, this action represented the first time the actual possessor of those rights commenced suit against the County and the Village.

motion for substitution of judge on the Honorable Earl Schmidt, he lost the authority to act and the subsequent foreclosure judgments he entered were void.

On February 28, 2001, the trial court denied, again without a hearing, the petitioners' claims and dismissed their action. (App. C). Once again, the court refused to address the petitioners' claim that the taking of their property was without due process and instead relied on the prior litigation as precluding their claims. (*Id.*). The court also ordered that:

> No papers may be filed henceforth in this case without order from the court, and that Shawano County has no legal requirement to respond unless ordered by the Court.

(*Id.*). The petitioners appealed. (App. B).

On April 16, 2002, the Wisconsin court of appeals issued a decision affirming the trial court's judgment against the petitioners. (App. B). Once again, however, the appellate court refused to address the petitioners' issues on the grounds they had been addressed or could have been addressed, in a previous appeal:

> The issues Minniecheske and Redman now raise are substantively the same as those rejected in our opinion entered on a previous appeal. *See* ***Shawano County v. Redman***, No. 95-2938 slip. op. (Wis. Ct. App. Sept. 24, 1996). In that opinion, we rejected claims that the foreclosure judgment was void due to noncompliance with procedural and notification requirements and the foreclosure court's failure to grant a recusal motion.
>
> Because the validity of the foreclosure judgment has previously been considered and resolved, it is settled for the purpose of this action and cannot be the

> subject of a subsequent appeal. Also, questions raised on a second appeal which might have been raised and resolved in the former appeal are barred by res judicata, a doctrine now known as claim preclusion. *See Olson v. Hardware Dealers Mut. Fire Ins. Co.*, 45 Wis. 2d 569, 579-80, 173 N.W.2d 599, (1970). Consequently, if Minniecheske and Redman failed to characterize their arguments during the previous actions and appeal already heard on those issues, in the same manner as they do now, they are precluded from doing so at this juncture. *See id.*

(App. B, pp. 3-4) (bolding in original). Thereafter, the Wisconsin supreme court denied the petitioners' request for review. (App. A).

This petition represents the petitioners' last opportunity to vindicate their rights of due process in the taking of their property.

ARGUMENT

I. THE WISCONSIN COURTS, THROUGH THE DOCTRINE OF CLAIM PRECLUSION AND OTHER PROCEDURAL IRREGULARITIES, HAVE REPEATEDLY DENIED THE PETITIONERS A MEANINGFUL OPPORTUNITY TO BE HEARD ON THE MERITS OF THEIR CLAIM THAT THERE WAS A DUE PROCESS NOTICE VIOLATION IN THE TAKING OF THEIR PROPERTY.

Two threshold observations are essential to an understanding of the merits of this petition. First, the foreclosure judgment in this case was not simply "voidable," but rather, "void." The simple syllogism advanced by the petitioners was that because mortgage holder Richards was not provided with notice of the foreclosure proceeding, and because strict compliance with statutory requirements was a due process prerequisite to foreclosure, the foreclosure judgment was void.

Second, it is imperative to note that before his death, Richards conveyed to Minniecheske his mortgage on the property in question. Minniecheske therefore acquired uncontested standing to pursue the claim of inadequate notice in the original foreclosure proceeding. The action immediately below therefore constitutes the first time that an action was directly prosecuted by the mortgage holder.

A. The Failure To Provide A Mortgage Holder With Notice Of The Foreclosure Proceeding Yielded a Void Judgment.

Because Richards was not just a "lien holder" but a "mortgagee of record" under Wisconsin Statute §75.521(5),[11] (App. G), this required notice be attempted upon him by certified or registered mail as a condition precedent to a lawful tax lien foreclosure. This return receipt proof of mailing is a *sine qua non* in the statute which expressly provides proof of receipt, or an affidavit filed by the treasurer stating such mailing was attempted to the last know address, be on file:

> A copy of the petition and so much of the list of tax liens as shall include the description of a particular parcel **shall be mailed by registered or certified mail**, return receipt requested, by the county treasurer **to the last-known post-office address of each owner and mortgagee of record**, the state of Wisconsin in the instances specified in par. (am) 2, and to each municipality, other than the foreclosing county, having any right, title or interest in the land or in the tax liens or the proceeds thereof. An affidavit of the treasurer setting forth the names of the owners, mortgagees . . . whom a post-office address has been ascertained, giving the addresses and stating that notice was mailed, giving the date of mailing . . .shall be filed and constitute full compliance with this paragraph.

(*Id.*). (Emphasis added). This Court confirmed that notification of owners of a foreclosure proceeding is an indispensable

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[11] Although Minniecheske is now the mortgage holder of record, the petitioners will continue to refer to "Richards" as the mortgage holder for the sake of historical accuracy and immediate clarity.

component of due process. *Nelson v. City of New York*, 352 U.S. 103, 108-110 (1956).

It has never been disputed that Richards was a mortgage holder of record or that no notice of the foreclosure proceeding was provided to him in the manner specified by statute. Indeed, the petitioners submitted affidavits establishing that Richards qualified as a "mortgagee" as indicated by the records of the Registrar of Deeds. Accordingly, Richards was entitled to the same efforts at compliance with the statutory notice requirement to which the Wisconsin Supreme Court had required scrupulous adherence in *Young, supra*, 316 N.W.2d at 365. "Absent strict compliance, it would violate due process to allow such a governmental taking."[12] *Id. See also United States ex rel.* Walker, 109 U.S. 258 (1983)(judgment is void if the rendering court entered a decree "not within the powers granted to it by the law"). *See also Wengerd v. Rinehart*, 338 N.W.2d 861, 868 (Wis. App. 1983). ("Judgments entered contrary to due process are void."), *citing United States v. McDonald*, 86 F.R.D. 204, 208 (N.D. Ill. 1980).[13]

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[12] Justice Abrahamson reached a similar conclusion in *Leciejewski v. Sedlak*, 342 N.W.2d 734, 739-40 (Wis. 1984) (Abrahamson, J. dissenting), concluding that since the actual owners who had acquired title by adverse possession were not given notice, while the "record owner" was given notice, such admission did not qualify as adequate notice of the tax sale. *See In Matter of Estate of Fessler*, 302 N.W.2d 414, 419 (Wis. 1981) (Due process requires an individual whose rights will be affected by judicial decree be given notice reasonably calculated to inform person of the proceeding and afford an opportunity to object and defend rights). To show a procedural due process violation, plaintiffs must prove they: (1) had a property right; (2) of which the Village deprived them, and (3) the Village failed to provide the constitutionally mandated procedures. *Doherty v. City of Chicago*, 75 F.2d 318, 322 (7th Cir. 1996).

[13]A discussion of how judgments issued in a manner inconsistent with due process of law are void can also be found at 11 Wright, Miller & Kane, *Federal Practice and Procedure*: Civil 2d § 2862 (1995).

B. Void Judgments May Be Collaterally Attacked At Any Time.

For a judgment to be preclusive in all subsequent actions between the same parties or their privies, it must be issued in the exercise of competent jurisdiction. *Kalb v. Feuerstein*, 308 U.S. 433, 438-39 (1940). For example, a county's failure to fully comply with statutory requirements by neglecting to provide notice by mail and publication under Wisconsin Statute §75.521(3)(a)(2) to a bona fide owner "render[ed] the Foreclosure Judgment void." *Young* at 364-65. *Young* observed the notice requirements of §75.521(3)(a)(2), "applies to 'the last owner or owners, and the mortgagee or mortgagees,' as indicated by the records of the Registrar of Deeds." *Young* at 365. Since no attempt was made to comply with the statutory notice requirements for one individual who qualified as an "owner" under §75.521, *Young* determined full compliance with the statute was not satisfied.

> If the county strictly follows the statutory requirements, then it obtains a fee simple absolute; if the county fails to comply with the statute, it obtains no interest in the property.

Id. Young explained, "Young had an ascertainable interest in the land prior to the foreclosure, still retains that interest and may bring an action to set aside the void Judgment." *Id.*

Young concluded the Motion to Vacate the judgment, which was void due to lack of strict compliance with the statutory notice requirements, was timely since it was brought within a reasonable time. *Id.* Within a few years, however, the Wisconsin supreme court clarified that "section 806.07(2), Stats., requiring motions to vacate orders or judgment to be brought within a 'reasonable time' does not apply to void judgments." *Neylan* at 655. *Neylan* acknowledged that Motion for Relief from Judgment "presupposes the entry of a valid judgment . . . it has nothing whatsoever to do with the vacation

of a void judgment." *Id.*, *quoting West v. West*, 262 N.W.2d 87, 90 (Wis. 1978) (interpreting predecessor to Wisconsin Statute §806.07).

This Court has stated (although it was arguably dicta) that where there is an issue involving "publication of notice in strict form in proceedings *in rem* against absent defendants," the resultant adjudication may be collaterally attacked. *Stoll v. Gottlieb*, 305 U.S. 165, 176-77 (1938). Wisconsin courts agree. A void judgment may be expunged at any time, *Neylan* at 656, because such judgment is a nullity:

> When a court or other judicial body acts in excess of its jurisdiction, its orders or judgments are void and may be challenged at any time.
>
> A judgment or order which is void may be expunged by a court at any time. Such right to expunge a void order or judgment is not limited by statutory requirements for reopening, appealing from, or modifying orders or judgments.
>
> The fact that the award came many years after the void order is of no consequence. In *Halbach* . . . the void judgment was challenged ten years after entry. The court stated that laches did not apply even if the plaintiff had been dilatory or lackadaisical in his efforts to overturn the judgment. "It is the duty of the court to annul an invalid judgment."
>
> A void judgment cannot be validated by consent, ratification, waiver or estoppel. Furthermore, void judgments may be attacked collaterally. (Footnote omitted.)

Neylan at 656. (Citations omitted). *See also Santiago v. Portman*, 286 F.3d 1014, 1018 (7th Cir. 2002)(unarguably void judgment subject to collateral attack).

To explain why the petitioners can attack the prior judgment, *Neylan* quoted the following principles from 7 J.Moore, *Moore's Federal Practice*, ¶60.25(2) (2d Ed. 1983):

> A void judgment is something very different than a valid judgment. The void judgment creates no binding obligation upon the parties, or their privies; it is legally ineffective . . . the judgment may also be set aside under 60(b)(4) within a 'reasonable time' which, as here applied, means generally no time limit, or the enforcement of the judgment may be enjoined. **The judgment may also be collaterally attacked at any time in any proceeding, state or federal, in which the effect of the judgment comes in issue, which means that if the judgment is void it should be treated as legally ineffective in the subsequent proceeding.** . . . And the substance of these principles are equally applicable to a void state judgment.

Neylan at 656-58. (Footnotes omitted.) (Emphasis supplied.) *See also O'Rourke Bros. Inc. v. Nesbitt Burns, Inc.*, 201 F.3d 948, 951 (7th Cir. 2000) (truly void judgment may be set aside "even at this late date").

C. Despite The Rule That A Void Judgment May Be Collaterally Attacked At Any Time, The Wisconsin Courts Have Never Addressed The Merits Of The Petitioners' Claim That The Foreclosure Judgment Is Constitutionally Void For Failure To Give Notice Of The Foreclosure Proceeding To A Mortgage Holder Of Record.

The petitioners understand that the tortured procedural history of this case may, at first blush, engender reluctance on the part of this Court to seriously entertain their petition. However, rather than constituting an impediment to review,

the petitioners posit that precisely because of its procedural posture, this petition presents the ideal context for this Court to proclaim the primacy of due process in the taking of property and the persistent need to protect those rights. Indeed, a decision by this Court voiding the foreclosure judgment following ten years of repeated failures by the Wisconsin courts to address the merits of the petitioners' due process claims will establish that due process in the taking of property is so fundamental that even after this passage of time, governmental action in derogation thereof cannot be allowed to stand.

Moreover, to trace the due process issue, it is not necessary to dig through the entire procedural history of this claim. Indeed, despite the fact the foreclosure judgment became final in 1993 (although a written order was not placed in the file), the due process claim at issue was not raised and properly framed until the 1996 action to void the foreclosure judgment. Having established that a foreclosure judgment is constitutionally void when notice of the proceeding is denied a mortgage holder, and that constitutionally void judgments may be attacked at any time, it is important to note that certain events and court rulings have conspired to deprive the petitioners of a ruling on the merits of this important constitutional claim.

As discussed above, the trial court in the 1996 action did not address the merits of the petitioners' due process claim, but instead, concluded the petitioners were barred from raising that claim by the doctrine of claim preclusion. Thereafter, a 1998 attempt to have the court of appeals review that decision was dismissed because the non-attorney petitioner was not authorized to prosecute an appeal on behalf of an entity. Thereafter, every attempt to obtain a ruling on the merits of the due process claim was met with the doctrine of claim

preclusion, despite state common law favoring the reopening of unconstitutionally rendered judgments.[14]

Procedural due process claims require a two-step analysis. The first step is to examine whether the petitioners have been deprived of a protected interest. The second step requires a determination of what process is due. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). Here, there can be no dispute that the petitioners, having lost 580 acres of land to the government in a foreclosure proceeding, were deprived of a protected interest. Real estate is a protected property interest. Real estate is a protected property interest. *Connecticut v. Doehr*, 501 U.S. 1, 15, (1991). The inquiry therefore turns to what process they were due.

This Court has repeatedly written that due process is a flexible concept which varies with the particular situation. *Zinerman v. Burch*, 494 U.S. 113, 127 (1990); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The fundamental require-

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[14] Public policy factors set forth in the common law also mitigated against claim preclusion under these circumstances:

> The taking of land by the government from an individual for failure to pay taxes on the land is a very drastic measure. Unless the statutory procedures are strictly complied with, a court has no jurisdiction to render a Foreclosure Judgment.

Young, 316 N.W.2d at 365. In determining whether a default judgment should be vacated, three factors should have been considered: (1) if the statute relating to the vacation of default judgment is remedial, it should be liberally construed; (2) the general policy favors giving litigants their day in court; and (3) default judgments are regarded with disfavor in the eyes of the law. *Dugenske v. Dugenske*, 257 N.W.2d 865, 867 (Wis. 1977). *See also Michelle T. v. Crozier*, 495 N.W.2d 327 (Wis. 1993). *See also Conrad v. Conrad*, 284 N.W.2d 674 (Wis. 1979) (section 806.07(1)(h) should be liberally construed to allow relief from judgment whenever appropriate to accomplish justice); *State ex rel. M.L.B. v. D.G.H.*, 363 N.W.2d 419 (Wis. 1985) (section 806.07(1)(h) allows relief even if claim sounds in paragraphs (a), (b) or (c) if extraordinary circumstances justifies relief).

ment of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Parrat v. Taylor*, 451 U.S. 527, 540 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). While a state may not always be required to provide a hearing prior to the deprivation of property, *Hudson v. Palmer*, 468 U.S. 517, 533 (1984), at a minimum there must be a post-deprivation opportunity to be heard and access to a remedy. *Zinerman*, 494 U.S. at 128; *Hudson*, 468 U.S. at 534.

It would seem to be beyond dispute that a petitioner's "meaningful opportunity to be heard" must include an actual examination of the merits of the petitioner's claims. Here, the petitioners have repeatedly challenged the fundamental fairness of the state's procedures in refusing to address the substance of their due process objection to a foreclosure action which was effectuated without proper notice to a mortgage holder of record. This colorable objection to the validity of the State's procedures alleges a constitutional violation sufficient to invoke this Court's jurisdiction. *See*, *Hudson*, 468 U.S. at 539 (O'Connor, J. concurring).

II. THE TRIAL COURT'S FAILURE TO HONOR REDMAN'S TIMELY REQUEST FOR RECUSAL DEPRIVED HER OF THE DUE PROCESS RIGHT TO HAVE HER CLAIMS HEARD BY AN UNINTERESTED JUDGE.

Much confusion arose from both the parties' and the court's interchanging references to substitution and recusal as if they were one in the same.[15] The petitioners originated the confusion by initially advancing allegations to support disqualification as a basis for recusal, as well as claims that jurisdiction was affected by the earlier court's denial of such request. One issue advanced by the petitioners - the issue raised here - was that as an interested party named by the County in its tax foreclosure filing, Judge Schmidt was bound to recuse himself from the action.

Due process includes the right to have one's claims heard by a detached and neutral magistrate. *Concrete Pipe & Prods. v. Constr. Laborers Trust*, 508 U.S. 602, 617 (1993). Before one may be deprived of a protected interest, whether in a criminal or civil setting, *see Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242, and n. 2 (1980), one is entitled as a matter of due process of law to an adjudicator who is not in a situation "'which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true. . . .'" *Concrete Pipe & Prods.*, 508 U.S. at 617-18, *citing, Tumey v. Ohio,* 273 U.S. 510, 522 (1927). To this end, it should be noted that the Wisconsin supreme court's judicial code of ethics states:

> Except as provided in sub. (6) for waiver, a judge shall recuse himself or herself in a proceeding when the facts and circumstances the judge knows or

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[15] *See, e.g.*, court of appeals decision discussing only the conclusion the trial court had "no duty to recuse itself" rather than addressing the timeliness and effect of Redman's substitution request. (App. D).

> reasonably should know establish one of the following or when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial:
>
> * * *
>
> The judge knows that he or she, individually or as a fiduciary, or the judge's spouse or minor child wherever residing, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than *de minimis* interest that could be substantially affected by the proceeding.
>
> * * *
>
> A judge shall keep informed of the judge's own personal and fiduciary economic interests and make a reasonable effort to keep informed of the personal economic interests of the judge's spouse and minor children residing in the judge's household, having due regard for the confidentiality of the spouse's business.

Wisconsin Supreme Court Rules CR 60.04(4)(d) and 60.04(5).

As a lienholder of record on the very property he was being asked to judicially foreclose, Judge Schmidt had a fiduciary interest in the outcome of the action and should have recused himself from the proceeding. Given the Wisconsin supreme court rules which he was duty bound to follow, he should have been sufficiently vigilant to realize the involvement of his own pecuniary interest even absent a formal request for recusal. His failure to remove himself even after the danger of partiality was expressly brought to his attention is inexplicable and unjustifiable.

In examining this issue, this Court should bear in mind that Judge Schmidt's interest in the property in question did not originate with some wild allegation by the petitioners. On the contrary, it was the County which noted his interest in the property when it filed its original petition for foreclosure. At no point during the underlying proceedings was it ever maintained that the inclusion of Judge Schmidt as an interested party in the foreclosure was made in error.

When a deprivation occurs as the result of a random and unauthorized act of a state employee, a meaningful post-deprivation remedy for the loss must be available. *Hudson*, 468 U.S. at 533. Where a state law remedy exists, the petitioners must either avail themselves of the remedies guaranteed by state law or demonstrate that the available remedies are inadequate. *Daniels*, 474 U.S. at 339-40 (Stevens, J., concurring). Here, the remedy ostensibly available to the petitioners was the right to request recusal and/or substitution. The petitioners availed themselves of that remedy and did so in a timely fashion following notice of the assigned judge. That their request was so cavalierly rejected and then substantively ignored in all of the ensuing proceedings demonstrates the inadequacy of the putatively available remedy.[16]

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[16] Another issue rejected by the state courts, and included here merely to further highlight the trial court bias, was Redman's timely request for substitution of judge under Wisconsin Statute §801.58(2) which states "the named judge shall have no further jurisdiction in the action or proceeding" except to determine if the request is proper and to request the assignment of a new judge. This observation is notable because of the legion of Wisconsin cases which auger against the courts' cavalier rejection of this issue. "Jurisdiction" as used in Wisconsin Statute §801.58(2) addresses the "competency of the court to proceed." *City of La Crosse v. Jiracek, COS. Inc.*, 329 N.W.2d 441 (Wis. App. 1982). Thus, while this issue does not present a question of constitutional dimension, it does further substantiate the deprivation of a detached and neutral judge.*See State ex. Rel. Tessmer v. Circuit Court Br. III*, 367 N.W.2d 235 (Wis. App. 1985); *Tinti v. Waukesha County Ct.*, 464 N.W.2d 853, 855 (Wis. 1990). *See also Baldwin v. State*, 215 N.W.2d 541 (Wis. 1974).

III. SECTION 75.521 OF THE WISCONSIN STATUTES IS CONTRARY TO THE UNITED STATES CONSTITUTION INSOFAR AS IT ALLOWS THE TAKING OF PROPERTY WITHOUT REQUIRING THE PAYMENT OF JUST COMPENSATION.

The foreclosure proceeding which ultimately resulted in the taking of petitioners' property was premised upon section 75.521 of the Wisconsin Statutes. Section 75.521(13) states:

> (a) Where, as to any parcel in the list of tax liens, an answer has been interposed by a party and the court shall determine in favor of such party upon such answer, the court shall make a final judgment divesting said parcel of the lien alleged to have accrued against same.
>
> (b) In the event that the court shall determine that the issue raised by the answer of the defendant is without merit, a final judgment to such effect shall be entered ordering and adjudging that the county is vested with an estate in fee simple absolute in such lands subject, however, to all unpaid taxes and charges which are subsequent to the latest dated tax lien appearing on the list specified in sub. (3) (b) and to recorded restrictions as provided by s. 75.14, and all persons, both natural and artificial, including the state of Wisconsin, infants, incompetents, absentees and nonresidents who may have had any right, title, interest, claim, lien or equity of redemption in such lands, are forever barred and foreclosed of such right, title, interest, claim, lien or equity of redemption.

(App. G). The Wisconsin court of appeals has interpreted this language, and the statute as a whole, to allow the government to retain the excess proceeds following liquidation of the tax delinquency, when the subject property is subsequently sold

following the foreclosure. *Ritter v. Ross*, 558 N.W.2d 909 (Wis. Ct. App. 1996).

In *Ritter*, Rock County began a foreclosure proceeding when a tax arrearage of $84.43 on the Ritter's property remained unpaid for several years. The Ritters did not defend the action and, after obtaining a foreclosure judgment under Wisconsin statute section 75.521, the County sold the property to a third party for $17,345, retaining the entire amount of the sale proceeds. The Ritters challenged the retention of those proceeds arguing, *inter alia*, that doing so was violative of the Due Process and Takings Clauses of the Fifth and Fourteenth Amendments.

The Wisconsin court of appeals rejected the Ritters' constitutional claims. *Ritter*, 558 N.W.2d at 916. Because Wisconsin's state constitution and tax codes were silent as to the distribution of excess proceeds received in a tax sale, *Ritter* noted that a municipality may constitutionally retain them. *Id.* at 912. Importantly, this reasoning came with a large caveat: "as long as notice of the action meets due process requirements." *Id.*

Indeed, *Ritter,* relying upon a decision of this Court, further elucidated what it meant by due process requirements:

> In *Nelson v. New York*, 352 U.S. 103 (1956), the United States Supreme Court rejected a claim under the Takings Clause when the municipality sold the plaintiffs's property for $7000 - to satisfy a $65 tax delinquency - and retained the proceeds. *Id.* at 105-06. The Court concluded that "nothing in the Federal Constitution prevents this **where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings.**

Ritter, 558 N.W.2d at 912. (Emphasis added).

A review of *Nelson* reveals circumstances quite distinct from those found in the present case. In *Nelson*, the property owners were four years delinquent on their water bill. Importantly, there was no claim the City had failed to give proper notice of the delinquency or the resultant foreclosure proceeding, rather, the owners claimed their bookkeeper concealed from them the nonpayment of the water charges. *Nelson*, 352 U.S. at 107. This Court stated:

> It is clear that the City cannot be charged with responsibility for the misconduct of the bookkeeper in whom appellants misplaced their confidence nor for the carelessness of the managing trustee in overlooking notices of arrearages.

Id. at 108. This Court concluded that the City having taken the appropriate steps to notify the appellants of the arrearages and the foreclosure proceedings and their agent having received such notices, application of the statute did not deprive the appellants of procedural due process. *Id.* at 108-09.

Thus, the key distinction which separates this case from *Nelson* is the latter's reliance on the absence of any procedural due process irregularities when holding the City could retain the excess proceeds without violating the appellants' Fifth and Fourteenth Amendment rights. Standing in stark contrast to the fair play appellants received in *Nelson*, the petitioners in this case saw their due process rights undercut repeatedly. They were deprived of an adjudication by an uninterested judge. A mortgage holder was not provided notice of the foreclosure proceeding. Thereafter, no state court was willing to address the merits of their claims, further depriving them of a *meaningful* opportunity to be heard in a *meaningful* manner. *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985).

Wisconsin's foreclosure statute must yield to the dictates of the Fifth and Fourteenth Amendments. The Supremacy Clause of the United States Constitution demands that when a

provision of the Constitution and a state law come into conflict, it is the constitutional provision, as the "Supreme Law of the Land," which must win. *See, e.g., Bennett v. Arkansas*, 485 U.S. 395, 397 (1988); *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993); *Owens v. City of Independence*, 445 U.S. 622, 647, n30 (1980). In this case the Supreme Law of the Land trumps and invalidates, as an unconstitutional taking without just compensation, the attempt to use Wisconsin Statute Section 75.521 to acquire the petitioners' property in derogation of their due process rights.

CONCLUSION

This petition presents a compelling opportunity for this Court to develop the law of due process in a unique context. The petitioners strongly believe the County's aim in this case was to divest them of their property at an unconscionably low price. For obvious reasons, such an allegation is difficult to prove. One might expect, however, that such an effort would manifest itself in acts displaying a lack of regard for the petitioners' due process rights.

Such a disregard is precisely what occurred in this case. It is this deprivation and subsequent inability to obtain meaningful redress which makes these facts an ideal vehicle with which to drive home the primacy of due process protections in the taking of property. For all of the foregoing reasons, the petitioners respectfully request that the United States Supreme Court grant their petition.

Dated this 24th day of October, 2002.

ANDEREGG & MUTSCHLER, LLP

Rex R. Anderegg
Attorneys for Petitioner

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SUPREME COURT [SEAL] OF WISCONSIN

OFFICE OF THE CLERK
Supreme Court of Wisconsin
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
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Web Site: www.courts.state.wi.us

To:

July 26, 2002

Hon. Earl Schmidt
Shawano County Circuit Court
311 N. Main Street
Shawano, WI 54166

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Pamela M. Schmidt
Whyte Hirschboeck Dudek, S.C.
111 E. Wisconsin Ave., #2100
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Susan Krueger
Shawano County
Clerk of Courts
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Shawano, WI 54166

Jo Ann Redman
W15398 County Road M
Tigerton, WI 54486-9232

Donald Minniecheske
W-15398 Hwy M
Tigerton, WI 54486

You are hereby notified that the Court has entered the following order:

No. 01-1997 In the Matter of the Foreclosure of Tax Liens:
Shawano County v. Minniecheske L.C. #86CV0

A petition for review pursuant to Wis. Stat. § 808.10 and a petition for supervisory writ having been filed on behalf of respondents-appellants-petitioners, Donald Minniecheske and Jo Ann Redman, and considered by this court;

IT IS ORDERED that both petitions are denied, without costs.

Cornelia G. Clark
Clerk of Supreme Court

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WISCONSIN [SEAL] COURT OF APPEALS

DISTRICT III

To:

April 16, 2002

Hon. Earl Schmidt
Shawano County Circuit Court
311 N. Main Street
Shawano, WI 54166

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You are hereby notified that the Court has entered the following opinion and order:

01-1997 Shawano County v. Donald Minniecheske (86-CV-0)

Before Cane, C.J. Hoover, P.J. and Peterson, J.

This appeal arises out of a 1986 tax lien foreclosure action. Donald Minniecheske and JoAnn Redman appeal a judgment and order denying relief under WIS. STAT. § 806.07 and awarding costs and attorneys fees in the sum of $1,803.13 in favor of Shawano County and against JoAnn Redman. The trial court found that because Redman filed frivolous motions, Shawano County was entitled to costs and reasonable attorney fees pursuant to WIS. STAT. §§ 802.05 and 814.025. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (1999-2000).

Minniecheske and Redman make four arguments: (1) There is newly discovered evidence pertaining to judgments entered in 1992, 1993 and 1995; (2) Orlando Richards conveyed a mortgage but was never given notice pursuant to WIS. STAT. § 75.521(3)(c); (3) judgment and lien holders were never served with notice under § 75.521(3)(c); and (4) the

judge should have recused himself for conflict of interest because he was listed as an interested party and lien holder. We summarily affirm the order and judgment.

The issues Minniecheske and Redman now raise are substantively the same as those already rejected in our opinion entered on a previous appeal. *See Shawano County v. Redman*, No. 95-2938 slip op. (Wis. Ct. App. Sept. 24, 1996). In that opinion, we rejected claims that the foreclosure judgment was void due to noncompliance with procedural and notification requirements and the foreclosure court's failure to grant a recusal motion.

Because the validity of the foreclosure judgment has previously been considered and resolved, it is settled for the purpose of this action and cannot be the subject of a subsequent appeal. Also, questions raised on a second appeal which might have been raised and resolved in the former appeal are barred by res judicata, a doctrine now known as claim preclusion. *See Olson v. Hardware Dealers Mut. Fire Ins.*

Co.. 45 Wis. 2d 569, 578-80, 173 N.W.2d 599 (1970). Consequently, if Minniecheske and Redman failed to characterize their arguments during the previous actions and appeal already heard on those issues, in the same manner as they do now, they are precluded from doing so at this juncture. *See id.*

In addition, Minniecheske and Redman do not demonstrate that the court erred when it concluded their claims were frivolous under WIS. STAT. §§ 802.05 and 814.025. They claim they have discovered new evidence, but fail to adequately identify the evidence and omit discussion how it would have entitled them to a new trial under WIS. STAT. § 805.13. *See* 806.07(1)(b) ("On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons: . . . (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3)"). We will not develop appellants' arguments. *See*

Barakat v. DHHS, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995).

Upon the foregoing

IT IS ORDERED that the order and judgment are summarily affirmed. WIS. STAT. RULE 809.21

Cornelia G. Clark
Clerk of Court of Appeals

STATE OF WISCONSIN CIRCUIT COURT FOR
MENOMONEE/SHAWANO COUNTIES
SHAWANO COUNTY DIVISION - BRANCH NO. 1

****

IN THE MATTER OF THE
FORECLOSURE OF TAX LIENS,
PURSUANT TO SECTION 75.521
WISCONSIN STATUTES
BY SHAWANO COUNTY
LIST OF TAX LIENS FOR
THE YEARS 1981THRU
1985 PROCEEDING IN REM
1986, (NUMBER ELEVEN)

ORDER
DENYING RELIEF

FILED
SHAWANO COUNTY
FEB 28 2001
SUSAN M. KRUEGER
CLERK OF COURTS

****

WHEREAS petitioners JoAnn Redman, Donald Minniecheske, and James Minniecheske have motioned the Court on October 19, 2000, for an evidentiary hearing pursuant to Sec. 806.07(1)(c)(d), Wis. Stats. on a judgment granted on February 1, 1993, nunc pro tunc December 29, 1992; and

WHEREAS this is a motion to obtain relief from said judgment in the above captioned case notwithstanding the erroneous caption on the motion, which caption is in violation of Sec. 802.04 Wis. Stats.; and

WHEREAS petitioners have added to the original motion by additional filings (henceforth all referred to as "motion") on December 27, 2000; January 4, 2001; January 17, 2001; February 15, 2001; and February 27, 2001; and

WHEREAS this motion to obtain relief from the December 29, 1992, judgment is not timely pursuant to Sec. 806.07 Wis.

Stats. (a portion objecting to Shawano County's motion for reasonable costs and attorney's fees by JoAnn Redman only is timely); and

WHEREAS, in the alternative, motions on substantively the same grounds to obtain relief from said judgment were filed unsuccessfully by petitioners JoAnn Redman and Donald Minniecheske on March 11, 1993, June 26, 1995, and June 3, 1998, thus making the instant motion for those petitioners a fourth motion for reconsideration; and

WHEREAS petitioner James Minniecheske unsuccessfully attempted to interplead himself as a party and move reconsideration in the June 3, 1998, motion, thus making the instant motion for him a second motion for reconsideration; and

WHEREAS the instant motion is an attempt by all petitioners, other than JoAnn Redman, to interplead themselves as parties and move reconsideration; and as to Donald Minniecheske: he has previously attempted to interplead by motions on December 14, 1992, March 11, 1993, June 26, 1995, and June 3 1998, all having been unsuccessful, thus making the instant motion at least a fifth motion to interplead; and for James Minniecheske: the instant motion is a second motion to interplead; and

WHEREAS the motion to interplead or intervene is not timely pursuant to Sec. 803.09 Wis. Stats.; and

WHEREAS Donald Minniecheske and James Minniecheske have no standing to petition the Court in this case; and

WHEREAS the instant motion for reconsideration is not timely pursuant to Sec. 806.07(2) and 805.17(3) Wis. Stats.; and

WHEREAS, in the alternative, the instant motion is subject to claim and issue preclusion as the claims and issues it raises are substantively the same as those already rejected by the District III Court of Appeals, Shawano County v Redman, No. 95-2938 slip op. (Wis. Ct. App. Sept 24, 1996) and In re tax Liens: Shawano County v. Donald Minniecheske, No. 98-2090 slip op. (Wis. Ct. App. May 4, 1999); and

WHEREAS, in the alternative, the alleged new factors are not relevant to the merits of the judgment; and

WHEREAS, in the alternative, the motion is without legal merit and is redundantly frivolous.

NOW THEREFORE the Court denies, without a hearing, the instant motion to interplead, intervene, and reconsider; and

IT IS HEREBY SO ORDERED.

and FURTHER:

WHEREAS Shawano County has moved the Court for a protective order prohibiting it from being harassed by redundant and frivolous motions; and

WHEREAS the Court has found repeatedly that petitioners' motions are redundant and frivolous; and

WHEREAS the Court finds petitioners' activities in this case to be harassment of Shawano County.

NOW THEREFORE the Court orders that no papers may be filed henceforth in this case without order from the Court, and that Shawano County has no legal requirement to respond unless ordered by the Court; and

IT IS HEREBY SO ORDERED.

and FURTHER:

WHEREAS Shawano County has asked for reasonable costs and attorneys' fees pursuant to Sec. 802.05 and 814.025 Wis. Stats.; and

WHEREAS the Court has repeatedly found petitioners' filings to be frivolous, and again so finds.

NOW THEREFORE the Court grants Shawano County's request for reasonable costs and attorneys' fees against JoAnn Redman who is the only petitioner who is a party; and

IT IS HEREBY SO ORDERED.

Dated this 28 day of February, 2001, at Shawano, Wisconsin.

BY THE COURT

/s/
Hon. Earl W. Schmidt
Circuit Judge Branch 1

cc: Corporation Counsel
Donald Minniecheske
JoAnn Redman
James Minniecheske
Attorney Pamela Schmidt

FILED
SEP 24 1996
MARILYN L. GRAVES,
CLERK OF COURT OF APPEALS
OF WISCONSIN

COURT OF APPEALS
DECISION
DATED AND RELEASED

SEPTEMBER 24, 1996

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 95-2938

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

In the Matter of the Foreclosure of Tax Liens, Pursuant to Section 75.521 Wisconsin Statutes by Shawano County, List of Tax Liens for the Years 1981 through 1985. Proceeding in REM 1986, Number Eleven:

SHAWANO COUNTY,

Petitioner-Respondent,

v.

JOANN REDMAN
and DONALD MINNIECHESKE,

Respondents-Appellants.

APPEAL from an order of the circuit court for Shawano County: EARL W. SCHMIDT, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. JoAnn Redman and Donald Minniecheske—hereafter collectively called "Redman"—appeal a September 13, 1995 trial court order that denied her March 11, 1993 motion to vacate a February 1, 1993 tax lien foreclosure judgment. The trial court issued the February 1, 1993 foreclosure judgment in response to Redman's September 8, 1992 motion seeking to vacate an earlier June 29, 1992 foreclosure judgment and the County's motion in response seeking the entry of a new foreclosure judgment. Redman's September 8, 1992 motion claimed that she had never received notice of the hearing leading to the June 29, 1992 foreclosure judgment. At a December 29, 1992 hearing, the trial court granted Redman's motion and vacated the June 29, 1992 judgment. However, the trial court then orally granted a new foreclosure judgment, over her twin objections that she needed

time to obtain a lawyer and that the trial court should recuse itself.

On February 1, 1993, the trial court entered a written foreclosure judgment embodying the oral ruling. Redman did not appeal the February 1, 1993 judgment. Instead, on March 11, 1993, she filed a motion to vacate the trial court's oral December 29, 1992 judgment. On May 1, 1995, she filed an amendment to her March 11, 1993 motion to vacate. By order entered September 13, 1995, the trial court denied her motion without a hearing. The trial court ruled that the motion was not timely and that it was frivolous on the merits. On appeal, Redman argues that the trial court should have recused itself from the December 29, 1992 hearing and should have granted a continuance for her to obtain counsel. She also maintains that the trial court actually issued and backdated the February 1, 1993 judgment sometime in September 1995. On this basis, she claims that her appeal is timely from the February 1, 1993 foreclosure judgment. We reject Redman's arguments and

affirm the trial court's September 13, 1995 postjudgment order.

We will not pursue Redman's claim that the trial court backdated the February 1, 1993 judgment sometime in September 1995. Redman did not raise this factual question before the trial court. We do not consider issues litigants have not raised in the trial court. ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). We also do not make findings of fact. ***Wurtz v. Fleischman,*** 97 Wis.2d 100, 107 n.3, 293 N.W.2d 155, 159 n.3 (1980). In addition, we note that Redman has failed to make a prima facie showing of judgment backdating. While Redman claims that an August 1995 examination of the file in the trial court clerk's office did not reveal the February 1, 1993 judgment, Redman acknowledges the existence of other documents that refer to the judgment. First, Redman expressly referred to the February 1, 1993 judgment in her May 1, 1995 amendment to her motion to vacate. She further made reference to the February 1, 1993

judgment in a notice filed in June 1995. She fails to explain how a judgment not in existence until September 1995 could be referred to in her moving papers filed prior to that date. Her claim is therefore inherently improbable. Courts may summarily reject inherently improbable claims. *See Lazarus v. American Motors Corp.* 21 Wis.2d 76, 84, 123 N.W.2d 548, 552 (1963).

We have jurisdiction, however, to review the trial court's rejection of Redman's March 11, 1993 motion to vacate, as amended May 1, 1995, because the court order denying the motion was not entered until September 13, 1995. Redman's March 11, 1993 motion to vacate contained material that did not meet the standards of § 806.07, STATS. It raised issues that were raised or should have been raised in the original proceedings and that should have been raised in an appeal from the February 1, 1993 judgment. For example, she alluded to some of the substantive issues and claims she had submitted before judgment, such as the following: (1) her land was tax

exempt church property; (2) she held her land free of taxation by virtue of natural rights, homestead rights, and federal land patent rights; (3) Wis. Const. Art. 1, §§ 14 and 17, exempted her land from taxation. She also claimed that the municipality lacked jurisdiction to tax her land and that a statute of limitations barred the tax liens. In addition, she reasserted that the trial court should have recused itself at the December 29, 1992 hearing and should have adjourned the hearing to permit her to obtain counsel.

The trial court's vacation in the June 29, 1992 foreclosure judgment and its issuance of a new one on February 1, 1993 was the final adjudication and res judicata on all such matters. *See* ***State v. Donohue***, 11 Wis.2d 517, 523-24, 105 N.W.2d 844, 847-48 (1960). Redman should have litigated them then, not by postjudgment motion under § 806.07, STATS. Further, if Redman wanted to challenge such matters in the court of appeals, she needed to file a timely appeal (sic) the February 1, 1993 judgment, not file a

postjudgment motion and appeal he order denying that motion. *Id.* Under ***Ver Hagen v. Gibbons***, 55 Wis.2d 21, 26, 197 N.W.2d 752, 755 (1972), litigants may not extend the time to appeal the judgment by filing a postjudgment motion and then appealing the trial court order denying the motion. This is what Redman has done with her postjudgment motion. We therefore will not address any of her issues or defenses from the original tax lien foreclosure proceedings.

The trial court had no duty to recuse itself from Redman's March 11, 1993 motion to vacate. Although Redman sought recusal before judgment, she apparently sought to continue this request in the postjudgment proceedings, and we therefore feel constrained to review the issue. Redman sought recusal on the basis of a third-party complaint Redman had filed against the trial court in a suit brought against her by Orlando Richards. The Richards' lawsuit ultimately ended in dismissal. Redman claims that the trial court's refusal to recuse itself makes the foreclosure judgment void. Trial courts have no

duty to automatically grant recusal on the basis of litigant lawsuits. *See In the Matter of Hipp*, 5 F.3d 109, 116 (5th Cir. 1993); *United States v. Studley*, 783 F.2d 934, 940 (9th Cir. 1985). Otherwise, litigants could disqualify any trial court by simply naming the judge as a defendant. *See Standing Committee v. Yagman*, 55 F.3d 1430, 1443-44 (9th Cir. 1995). Courts have never permitted this and have the power to disregard false or sham pleadings. *See* § 757.19(2)(b), STATS. They must grant recusal on the basis of litigant lawsuits only if the lawsuits cause them to develop actual bias. *Cf. State v. McBride*, 187 Wis.2d 409, 419, 523 N.W.2d 106, 111 (Ct. App. 1994). Here, Redman has provided nothing showing actual trial court bias.

We also specifically reject the merits of one new argument in Redman's March 11, 1993 postjudgment motion, as amended, on why the February 1, 1993 judgment was void. She claimed that the County failed to give notice to various lienholders on her land. She cited *In Matter of Foreclosure of*

Tax Liens, 106 Wis.2d 244, 316 N.W.2d 362 (1982), for the proposition that the judgment is void whenever the County fails to give notice of proceedings to one lienholder of record. The *Tax Liens* court held that a land contract vendee who received notice by publication could set aside a tax lien foreclosure judgment on the ground that the land contract vendor did not get notice by mailing or publication. In *Tax Liens*, the County made no attempt to give the land contract vendor notice by mail or publication. It did unsuccessfully attempt to give the land contract vendee notice by mail, and listed the land contract vendee's interest in the notice given by publication. We reject Redman's claim that the *Tax Liens* decision operates to void the February 1, 1993 foreclosure judgment on Redman's land.

Redman has identified no lienholder of record who retained a viable interest in the land yet received no notice by mail or publication. Although the County was unable to give lienholder Orlando Richards notice by mail, it did by

publication. This met the terms of the tax lien foreclosure statutes and provided Redman no basis to void the judgment. Redman likewise claimed that Marcella and Delores Lehman had a judgment lien on the land but never received notice of the proceedings. Redman stated, however, that the Lehman judgment dated from 1964. By the time of the foreclosure proceeding's commencement, the twenty-year judgment statute of limitations had expired on the Lehman twenty-two year-old judgment. *See* § 893.40 STATS. By virtue of the statute's expiration, the Lehmans no longer held a viable lien interest in Redman's land. The County therefore had no duty to give them notice of the foreclosure proceedings, and Redman may not rely on their alleged lack of notice as a basis to attack the foreclosure judgment under *Tax Liens*.

By the Court — Order affirmed

This opinion will not be published. *See* Rule 809.23(1)(b)5, Stats.

"I, Marilyn L. Graves, Clerk of the Court of Appeals of the state of Wisconsin, certify that I have compared the foregoing with the original order and/or judgment of the Court in the above entitled cause, and that it is a correct transcript thereof."

/s/
Clerk of the Court of Appeals,
State of Wisconsin

[2-20-97]
Date

COURT OF APPEALS
DECISION
DATED AND RELEASED
MAY 4, 1999

Marilyn L. Graves

Clerk, Court of Appeals

of Wisconsin

NOTICE

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No. 98-0610

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

In re the Finding of Attorneys Fees in

Life Science Church, Bible Camp & Christian Liberty Academy, Mission of Jesus Christ Almighty God v. Shawano County and Village of Tigerton:

William A. Pangman,

Appellant,

v.

Shawano County and Village of Tigerton,

Respondents.

APPEAL from a judgment of the circuit court for Shawano County: JAMES W. KARCH, Judge. *Reversed.*

Before Cane, C.J., Hoover and Schudson, JJ. CANE, C.J.

Attorney William Pangman appeals from the portion of a judgment awarding frivolous action costs to Shawano County and the Village of Tigerton under § 814.025, Stats.[1] On appeal, Pangman contends only[2] that the circuit court erred by awarding frivolous action costs against him because: (1) he advanced two distinct positions "correctly establishing" that a tax foreclosure judgment was void; (2) even if his claims were deemed "insufficiently persuasive," they were not frivolous; (3) §814.025 should not be used to benefit parties whose allegations of frivolousness, "as evidenced by their own actions," are themselves frivolous; and (4) his involvement in this case clarified and simplified the proceedings, thus reducing the defendants' attorney fees.

We conclude that Pangman's continuation of this action was not frivolous because when he became involved in the case and later filed a brief opposing defendants' summary judgment motions, there was a legitimate question whether claim preclusion applied and whether the plaintiffs could collaterally attack the foreclosure judgment. Accordingly, we reverse that portion of the judgment requiring him to pay frivolous action costs.

I. Background

At the outset, we note that the parties have extensively litigated this appeal's underlying subject, a land dispute between the Minniecheske family's Life Science Church and Shawano County and the Village of Tigerton. To resolve the issue on this appeal, however, we need not attempt the daunting task of summarizing this dispute's procedural history. Rather, we will set forth only the applicable factual and procedural background pertinent to this appeal.

In April 1996, plaintiffs, through attorney Paul Horvath who initially represented the plaintiffs, filed a complaint against Shawano County, the Village of Tigerton and others. The complaint requested that the circuit court void a tax foreclosure judgment and restore the Life Science Church's title based on the defendants' alleged failure to comply with statutory notice requirements of § 75.521, Stats.,[3] and the foreclosure court's refusal to grant a judicial substitution request. After a series of cross claims and third-party complaints, and following numerous judicial substitutions, the circuit court scheduled a motion hearing for May 1997 to consider fourteen pending motions. These motions included the plaintiffs' motions for injunctive relief, the County's and Village's motions to dismiss the third-party complaints, the Village's motion to dismiss the complaint under the doctrines of issue and claim preclusion, and the Village's motion for frivolous action costs against the plaintiffs and Horvath pursuant to §§ 814.025 and 802.05(1), Stats.

Pangman first appeared in an advisory capacity with Horvath at the May 1997 motion hearing, but planned to become co-counsel once he was "up to speed" with the case. At the hearing, Pangman suggested that the court entertain opposing motions for summary judgment concerning whether the plaintiffs could collaterally attack the tax foreclosure judgment. In addition, Pangman suggested that all other issues be "put ... off" pending the court's resolution of the summary judgment. Counsel for the Village and the County agreed that as a threshold matter, the court should first determine whether the tax foreclosure judgment was subject to collateral attack.

The circuit court ultimately dismissed all the third-party claims, denied the plaintiffs' motion for injunctive relief, and established a briefing schedule for summary judgment motions. Before adjourning, the court stated:

> I would be remiss if I did not address the convoluted state of this case.
>
> It has been extremely difficult to unravel the claims to determine the status of the parties, and determine whether there is or is not merit in any of the claims. I struggled with it at length; counsel have, with the testimony, to the same extent.
>
> ....
>
> ... I think the complaint of the plaintiffs was a sham pleading.

In their summary judgment motions, the defendants argued that because the plaintiffs had collaterally attacked the foreclosure judgment at least twice, the circuit court could properly grant summary judgment under the doctrines of claim and issue preclusion. In September, Pangman filed a brief in opposition to defendants' motions, and in his cover letter, explained that he had been retained immediately before the May hearing "for the purpose of identifying legal issues raised by the Plaintiff[s'] underlying action, and to assist in the presentation of these issues to this court." Horvath was to remain the counsel of record.[4] Pangman's letter clarified his role: "I have agreed to represent Plaintiffs only for the limited purposes of briefing these pre-trial issues. My function has been to attempt to separate the wheat from the chaff to assist the parties in legitimately joining issue."

Further, Pangman's letter indicated that Horvath was closing his practice and had placed him in the "unenviable position of attempting to grasp the substance of an extensive and complex factual and procedural history ... to defend the posture of a case which I had no hand in initiating." Further, Pangman noted that if he had been involved from the outset, he would

have structured the pleadings to raise issues in a "more straight forward manner" and that he hoped that his brief would be "the dressing which might make previously tossed claims of Plaintiffs sufficiently palatable for this court and opposing counsel to digest."

In an October 31 letter, the circuit court notified counsel that it intended to grant defendants' summary judgment and dismiss the complaint based on the doctrine of claim preclusion. At a November 18 hearing, the court granted defendants' motion for summary judgment on that basis and ruled that although a party may collaterally attack a void judgment at any time, "[t]he rule does not say that a void judgment can be repeatedly attacked time after time." Additionally, the court explained that while the plaintiffs had complained repeatedly "about being denied the opportunity to have their challenges to the validity of the tax foreclosure proceedings heard on the merits," it was "of their own doing" because they had failed to secure legal assistance.

The court then turned to the motion for frivolous action costs. It first assessed frivolous action costs against Horvath, who was not present at the hearing. The court observed that ten years had passed between Minniecheske's first complaint against the defendants involving the property in question and the last filing. Regarding this fact, the court commented, "It's inconceivable that [Horvath] would not make some inquiry as to why ten years had passed without some proceedings to vindicate the plaintiffs' rights." The court then ruled that Horvath should have known of "the existence of litigation and disputes concerning the title to the property." Given that ruling, the court determined that such information would have led a reasonable attorney to conclude that the claim was frivolous as a matter of law. The court explained that a previous case had litigated the "exact same issue of title," but was barred under the doctrine of claim preclusion.[5] Accordingly, the circuit court

concluded that because claim preclusion likewise barred a subsequent action regarding the same issue of title, the action was frivolous.

Addressing Pangman's role, the circuit court remarked that the "same observations [it had] regarding claim preclusion and Mr. Horvath apply to Mr. Pangman." The court held that it strongly disagreed with Pangman's position that claim preclusion did not apply. Despite that disagreement, it denied the motion for sanctions against Pangman because "it would be unfair to assess any portion of the costs to him." Two factors influenced the court's decision. The court first pointed out that if Pangman had withdrawn after the May hearing, "the work of all of us would have been greater." Second, the court stressed that the case should have been resolved before Pangman received it. In addition, the court ordered Pangman to continue to represent the plaintiffs concerning assessment of costs.

Nonetheless, on December 12, the circuit court issued a "supplemental decision" *awarding* frivolous action costs against Pangman. Explaining its rationale for amending its initial decision, the court commented that the November hearing transcript disclosed the

> total lack of merit to the plaintiffs' case and Mr. Pangman's pursuit of it. In fact, my final ruling ... must have surprised if not bewildered not only the defendants' attorneys but Mr. Pangman as well. I can only attribute it to a mental lapse after the lengthy, frustrating and mostly irrelevant exchange I had with Mr. Pangman.

The court made three observations in support of its supplemental decision. First, it concluded that no reasonable attorney could fail to conclude that claim preclusion was an absolute bar to the plaintiffs' action. The circuit court further

concluded that in response to defendants' arguments that claim preclusion applied, Pangman submitted a thirty-page brief failing to deal with claim preclusion. Second, the court notified Pangman by letter that it intended to grant summary judgment on the basis of claim preclusion and that it would also consider the motion for frivolous costs and fees. In response, Pangman had failed to suggest why his "failure to recognize the bar of claim preclusion was reasonable." Finally, the court stated that in its two-hour dialogue with Pangman at the November hearing, he failed to rebut claim preclusion's application. Based on these observations, the court ruled that Pangman should have been aware that the plaintiffs' claim was frivolous no later than when he reviewed the defendants' initial briefs.

In a second supplemental decision dated December 30, the court stressed that its establishment of a briefing schedule "did not constitute an order that [Pangman] continue representation or take an indefensible position." Pangman then appealed.

II. Analysis

A claim is frivolous if the attorney or party "knew or should have known" that the claim had no reasonable basis in law or equity and could not be supported by a good faith extension, modification or reversal of existing law. Section 814.025(3)(b), Stats.; *see also* ***Stern v. Thompson & Coates, Ltd.***, 185 Wis.2d 220, 240-41, 517 N.W.2d 658, 665-66 (1994) (noting same). To prevail on a motion for sanctions for filing or continuing a frivolous action, defendants must overcome the presumption that the plaintiffs' action is not frivolous. *See* ***Kelly v. Clark***, 192 Wis.2d 633, 659, 531 N.W.2d 455, 464 (Ct. App. 1995). A court uses an objective standard and asks whether a reasonable attorney would have known or should have known, under the same or similar circumstances, that the action was frivolous. ***Stern***, 185 Wis.2d at 241, 517 N.W.2d at 666.

Whether an action is frivolous presents a mixed question of law and fact. *See State v. State Farm Fire & Cas. Co.*, 100 Wis.2d 582, 601, 302 N.W.2d 827, 837 (1981). What a reasonable attorney knew or should have known presents a factual question, *Juneau County v. Courthouse Employees*, 221 Wis.2d 630, 639, 585 N.W.2d 587, 590-91 (1998), and we will not reverse a circuit court's factual findings unless they are clearly erroneous. Section 805.17(2), Stats. In contrast, whether the circuit court's factual determinations support the legal determination of frivolousness is a question of law we review *de novo*. *Juneau County*, 221 Wis.2d at 639, 585 N.W.2d at 591.[6]

We resolve all doubts regarding frivolousness in the litigant's or attorney's favor. *Atkinson v. Mentzel*, 211 Wis.2d 628, 648, 566 N.W.2d 158, 166 (Ct. App. 1997). When determining if an action is frivolous, we are mindful that a significant purpose of § 814.025, Stats., is to help maintain the integrity of the judicial system and legal profession, and we are cautious about declaring an action frivolous lest we "stifle the ingenuity, foresightedness and competency of the bar." *Juneau County*, 221 Wis.2d at 650, 585 N.W.2d at 595. Here, to impose reasonable attorney fees and costs under the frivolous action statute, we must be satisfied that Pangman knew or should have known that the action to void the tax foreclosure judgment was "without any reasonable basis in law or equity." *See id.* at 640, 585 N.W.2d at 591.

On appeal, the defendants maintain that because a reasonable attorney should have known that claim preclusion barred the plaintiffs' claims, the action was frivolous. They contend that although a void judgment may be collaterally attacked, claim preclusion bars the plaintiffs from repeatedly challenging the foreclosure judgment after it has been deemed valid. The defendants further contend that the plaintiffs previously challenged the foreclosure judgment's validity on the same

grounds in ***Minniecheske v. Tigerton***, No. 95-2993, unpublished slip. op. (Wis. Ct. App. June 25, 1996); ***Shawano County v. Redman***, No. 95-2938, unpublished slip op. (Wis. Ct. App. Sept. 24, 1996); and ***Minniecheske v. Shawano County***, No. 95-2157, unpublished slip op. (Wis. Ct. App. May 7, 1996).[2]

Here, we need not decide whether claim preclusion applies because even if the doctrine indeed bars the action, Pangman's continuation of the action was not frivolous. Although the court found at the November hearing that Pangman knew or should have known that claim preclusion barred the action, it found that it would be unfair to sanction him for continuing the action when his participation reduced the parties' work and because the case should have been resolved before he became involved. When Pangman became involved at the May hearing and thereafter filed his brief in opposition to the summary judgment motion, there was a legitimate question regarding whether claim preclusion applied and whether the foreclosure judgment could be collaterally attacked. Further, the circuit court requested briefs on the issue, and while Pangman's arguments did not ultimately persuade the court, that does not render his continuation frivolous. Resolving all doubts in Pangman's favor, and considering the case's posture when Pangman became involved and filed his motion in opposition to summary judgment, we cannot conclude that no reasonable basis existed for his action to vacate the judgment as void. Accordingly, we reverse that portion of the judgment awarding frivolous action costs against Pangman.

By the Court.-Judgment reversed.

Not recommended for publication in the official reports.

1 Section 814.025, Stats., provides, in relevant part:

> **Costs upon frivolous claims and counterclaims.** (1) If an action ... commenced or continued by a plaintiff ... is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.
>
> ....
>
> (3) In order to find an action .. to be frivolous under sub. (1), the court must find one or more of the following:
>
> ....
>
> (b) The party or the party's attorney knew, or should have known, that the action ... was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

2 Pangman does not appeal the portion of the judgment dismissing the plaintiffs' complaint with prejudice against Shawano County and the Village of Tigerton. In a separate appeal, we rejected Donald Minniecheske's challenge to the trial court's dismissal of the complaint. ***Shawano County v. Minniecheske***, No. 98-2090 (Wis. Ct. App. May 4, 1999).

3 Section 75.521, Stats., governs proceedings involving foreclosure of tax liens by actions in rem.

4 From our review of the record, it does not appear that Pangman ever became co-counsel. Instead, it seems that he moved from his initial role as an advisor to his ultimate role as the only attorney on the case.

5 The court is apparently referring to *Minniecheske v. Tigerton*, No. 95-2993, unpublished slip op. (Wis. Ct. App. June 25, 1996), in which this court held that appellants could not, in a small claims restitution proceeding, collaterally challenge a tax foreclosure judgment for which the appeal time had expired.

6 Pangman cites the standard of review for a court's exercise of discretion in *Grace v. Grace*, 195 Wis.2d 153, 157, 536 N.W.2d 109, 110-11 (Ct. App. 1995), and suggests that we give "very little deference" to the circuit court's decision because of its "sua sponte" and "off-the-record about face" after refusing to sanction him at the November hearing. The standard of review to be applied for an award of frivolous action costs is well established, and *Grace*, which addressed a trial court's discretionary determination to hold open a wife's maintenance award, is inapplicable here.

7 Additionally, the Village asserts that even if claim preclusion does not bar the plaintiffs' action, it is still frivolous because issue preclusion applies and because the plaintiffs failed to file a proper notice of claim and itemized statement of damages. In fact, several of the plaintiffs' current claims, while directed at the same foreclosure judgment, are new. Nonetheless, the initial issue is whether a judgment that has been repeatedly sustained may be collaterally attacked based on the plaintiffs' insistence that it is void.

> The Village acknowledges that the trial court did not consider these additional claims, but citing *Auric v. Continental Cas. Co.*, 111 Wis.2d 507, 516, 331 N.W.2d 325, 330 (1983), it contends that we may properly address these issues because their resolution would sustain the judgment. *Auric* provides that a respondent may raise an issue in his briefs without filing a cross appeal "when all that is sought is the raising of an error which, if corrected,

would sustain the judgment." *Id.* Because that is not the case here, and because the trial court did not address those issues, we will confine our analysis to the arguments the trial court considered. *See Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980) (noting the general rule that, ordinarily, we will not consider arguments not raised to the circuit court).

DISTRICT III
Office of The Clerk
COURT OF APPEALS

COURT OF APPEALS
[SEAL]
OF WISCONSIN

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Marilyn L. Graves
Clerk

May 4, 1999

To:

Hon. Earl Schmidt
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Shawano County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

98-2090 In re Foreclosure of Tax Liens:
Shawano County v. Donald Minniecheske
(L.C. #86-CV-0)

Before Cane, C.J. Wedemeyer, P.J. and Hoover, J.

Donald Minniecheske appeals an order dated June 4, 1998, denying his motion seeking relief under § 806.07(1)(c) and (d), STATS., from a 1993 foreclosure judgment. He argues that: (1) void judgments may be attacked and expunged at any time and as often as necessary; (2) the 1993 judgment is void due to failure to adhere to § 75.521, STATS., notice and procedural requirements; and (3) the 1993 judgment is void because a substitution request deprived the court of jurisdiction or competency to proceed. We summarily affirm the order. RULE 809.21, STATS.

Minniecheske premises his appeal on his contention that a void judgment may be attacked at any time and as often as necessary. It is well established that a void judgment may be expunged by the court at any time. ***Neylan v. Vorwald***, 124 Wis.2d 85, 97, 368 N.W.2d 684, 655 (1985). Minniecheske does not squarely address the issue this record presents

however: whether he is entitled to relitigate the validity of a judgment he claims to be void.

Minniecheske contends that we should scrutinize the record to understand that this is the "first time any where, any place" the issue whether the foreclosure judgment was void is finally before the court. The record before us does not bear such scrutiny. It plainly demonstrates that the issues Minniecheske now raise (sic) are substantively the same as those already rejected on a previous appeal. The record contains our previous appellate opinion, ***Shawano County v. Redman***, No. 95-2938 slip op. (Wis. Ct. App. Sept. 24, 1996), in which we reviewed Minniecheske's 1993 motion to vacate the foreclosure judgment. In that opinion, we rejected Minniecheske's contentions that the foreclosure judgment was void due to noncompliance with procedural and notification requirements and the foreclosure court's failure to grant a recusal motion.

Because the validity of the foreclosure judgment has been considered and resolved, it is settled for the purpose of this action and cannot be the subject of a subsequent appeal. Also, questions raised on a second appeal which might have been raised and resolved in the former appeal are res judicata, a doctrine now known as claim preclusion. *See* ***Olson v. Hardware Dealers Mut. Fire Ins. Co.***, 45 Wis.2d 569, 579-80, 173 N.W.2d 599, 604 (1970). Consequently, if Minniecheske previously failed to refine and posture his arguments in the same fashion as he does now, during the previous actions and appeal already heard on those issues, he is precluded from doing so at this juncture. *See id.*

Shawano County has moved for appellate costs and reasonable attorney fees, pursuant to § 809.25, STATS. We decline to award § 809.25 costs, but remind appellate counsel that costs may be imposed in appeals that lack a reasonable basis in law and equity and cannot be supported by a good

faith argument for an extension, modification or reversal of existing law.

Upon the foregoing

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to RULE 809.21, STATS.

Marilyn L. Graves
Clerk of Court of Appeals

"I, Marilyn L. Graves, Clerk of the Court of Appeals of the state of Wisconsin, certify that I have compared the foregoing with the original order and/or judgment of the Court in the above entitled cause, and that it is a correct transcript thereof."

/s/
Clerk of the Court of Appeals,
State of Wisconsin

[5-4-99]
Date

COURT OF APPEALS

[SEAL]

OF WISCONSIN

Wisconsin Statute Section 75.521
Foreclosure of tax liens by action in rem.

(1) Definitions. Wherever used or referred to in this section, unless a different meaning clearly appears from the context:

(a) "County" means one of the counties of the state of Wisconsin.

(b) "Tax lien" means the lien or interest evidenced by any tax certificate upon which a tax deed may be applied for as provided by law.

(c) "Treasurer" means the treasurer of a county.

(2) Application of this section.

(a) Adoption of method. Notwithstanding the provisions of any other general, special or local law relating to foreclosure of tax certificates, taking of tax deeds upon tax certificates, and perfecting such tax deed title by bar former owner action or quiet title action, or conveyance from former owners of any interest in said lands, the governing body of any county may elect to enforce the collection of tax liens, the taking of tax title in the name of such county to tax delinquent lands and the perfecting of such tax title in the county in the cases where this section applies by means of the methods provided for in this section. Such election shall be evidenced by an ordinance to such effect in substantially the following form:

"ORDINANCE ELECTING TO PROCEED UNDER SECTION 75.521 Wis. Stats. IN RELATION TO THE ENFORCEMENT OF COLLECTION OF TAX LIENS.

The county board of supervisors of the county of ____ do ordain as follows:

From and after ____ (here insert dates) the ____ (here insert name of county) elects to adopt the provisions of section 75.521 Wis. Stats. for the purpose of enforcing tax liens in such county in the cases where the procedure provided by such section is applicable."

Upon the adoption of such ordinance, the provisions of this section shall be applicable to such county and the treasurer need not, thereafter, proceed upon its tax certificates in cases where this section is applicable in any of the other methods provided by ch. 75 or its charter provisions but may do so at the treasurer's option.

(b) Rescission of election to operate under section 75.521. Any county, after at least one year from the adoption of such ordinance, may rescind such election by an ordinance to such effect, which ordinance shall be adopted in the same manner as the original ordinance. Upon the adoption of a rescinding ordinance, the provisions of this section shall cease to be applicable to such county.

(c) Saving clause. Neither the election to adopt s. 75.521 nor the election to rescind the same shall affect any action or proceeding for foreclosure of the tax lien commenced prior to such election or rescission and such action or proceeding may be continued in the same manner as though such election or rescission had not been made.

(d) Provisions of in rem method supersede. Whenever any county shall have adopted this section and is using the procedure herein provided, the provisions of this section shall, with respect to the particular tax liens being collected, supersede the provisions of all general, special or local laws

relating to the collection of tax liens by such county in conflict therewith, provided that nothing contained in this subsection nor any use made of the procedure provided in this section shall prevent the use of other procedures provided for in other sections of the statutes in the collection of other tax liens at the option of the county treasurer.

(3) Commencement of proceeding to foreclose tax lien. (a) Whenever any land has been included in a tax certificate, the treasurer may file in the office of the clerk of the circuit court of the county, one or more lists of parcels of property affected by unpaid tax liens as shown on the tax certificates in the treasurer's office. The treasurer may file the list when any of the following time periods elapses after the date of the tax certificate:

1. One year, if razing, removing and restoration of the site to a dust-free and erosion-free condition costs incurred by any city or village are included in the amount due for taxes.

2. One year, if the tax certificate is held by any city authorized to proceed under s. 74.87 or by any county that has a population of 500,000 or more.

4. Two years, if none of the conditions specified in subds. 1. and 2. applies.

(am) The parcels shall be numbered consecutively in the list prepared under par. (a). The list shall be known as the "List of Tax Liens of ____ County Being Foreclosed by Proceeding in Rem ____ (year) No. ____" and shall bear the following caption:

"State of Wisconsin Circuit court

____ County

In the matter of the foreclosure of tax liens under section 75.521 Wisconsin Statutes by ____ County, List of Tax Liens for ____ (year), Number ____". The list shall contain as to each parcel, the following:

1. A brief description sufficient to identify each parcel affected by such tax lien. The description shall state the lot, block and section number of any parcel upon any tract, the plat or map of which is recorded and filed in the office of the register of deeds of such county. If the lands be unplatted an engineer's metes and bounds description shall be a sufficient description.

2. The name or names of the last owner or owners and mortgagee or mortgagees of the parcel as the ownership or mortgage interest appears of record in the office of the register of deeds of the county in which the parcel is situated, and the state of Wisconsin if it has a determined but unpaid death tax lien, a filed, nonoutlawed income or franchise tax warrant or a judgment entered in the judgment and lien docket, all in the county where the parcel is situated.

3. A statement of the amount of the principal sum of each tax lien in the hands of the county treasurer, together with the date from which and the rate at which interest shall be computed on said principal sum.

4. A petition to the court for judgment vesting title to each of said parcels of land in the county, as of the date of entry of judgment and barring any and all claims whatsoever of the former owner or any person claiming through and under the former owner since the date of filing the list of tax liens in the office of the clerk of the circuit court.

5. The names of all municipalities, other than the foreclosing county, having any right, title or interest in the land or in the tax liens or in the proceeds thereof.

(b) Such list of tax liens shall be verified by the affidavit of the county treasurer and shall be posted in the treasurer's office. The filing of such list of tax liens in the office of the clerk of the circuit court shall constitute and have the same effect as the filing and recording in the office of the register of deeds of such county of a separate and individual notice of the pendency of such proceeding as to each parcel described in such list, and likewise, not withstanding any other provision of law, shall constitute the commencement of a special proceeding by the county against each parcel of real estate therein described and have the same effect as the filing or recording of an individual and separate petition or complaint by the county against each parcel of real estate therein described to enforce the payment of the tax liens against such property.

(c) A copy of the petition and so much of the list of tax liens as shall include the description of a particular parcel shall be mailed by registered or certified mail, return receipt requested, by the county treasurer to the last-known post-office address of each owner and mortgagee of record, the state of Wisconsin in the instances specified in par. (am) 2., and to each municipality, other than the foreclosing county, having any right, title or interest in the land or in the tax liens or the proceeds thereof. An affidavit of the treasurer setting forth the names of the owners, mortgagees, the state of Wisconsin in the proper case and municipalities for whom a post-office address has been ascertained, giving the addresses and stating that notice was mailed, giving the date of mailing, and stating that no present post-office address was ascertainable for the other owners and mortgagees, shall be filed and constitute full compliance with this paragraph.

(3m) Extended time for foreclosing tax liens.

(a) In this subsection:

1. "Dwelling" means any building that contains one or 2 dwelling units and any land included with that building in the same entry on the tax roll.

2. "Dwelling unit" means a structure or that part of a structure used as a home, residence or sleeping place by one person or by 2 or more persons maintaining a common household, to the exclusion of all others.

(b) The common council of any city authorized to proceed under s. 74.87 may by ordinance direct its treasurer to defer the foreclosure of tax liens on dwellings. The ordinance shall designate the period of time that the foreclosure of tax liens shall be deferred after the one-year period provided under sub. (3) (a) 1. and 2. The deferral period may not exceed 2 years. The deferral shall apply to those delinquent taxes and assessments incurred while the dwelling was owned and occupied by the person who owns and occupies the building at the beginning of the deferral period. If the owner ceases to occupy the dwelling during the deferral period, the city treasurer shall foreclose the tax lien on the dwelling as soon as practicable. A city adopting an ordinance under this subsection may require the dwelling owner to submit proof that the owner is eligible for a deferral under this subsection.

(4) Duty of the clerk of circuit court. Each clerk of the circuit court with whom the list of tax liens is filed shall index it by year and list number, and alphabetically by the names of those set forth in the list, under sub. (3) (am) 2., in a separate record kept for that purpose and the clerk shall be entitled to a fee of $3 for receiving, filing and indexing of each such list, in lieu of any other fees to which he or she might otherwise be

entitled for those services. The circuit court of the county in which the delinquent list is filed has jurisdiction of the proceeding authorized by this section.

(5) Rights of persons having an interest in parcels of land affected by tax liens. Every person, including any municipal taxing district other than the county, having any right, title or interest in, or lien upon, any parcel described in such list may redeem such parcel by paying all of the sums mentioned in such list of tax liens together with interest thereon and the reasonable costs that the county incurred to initiate the proceedings under sub. (3) plus the person's share of the reasonable costs of publication under sub. (6), or such portion thereof as is due for the interest therein or part thereof owned by such person which amount shall be determined by the county treasurer on application, before the expiration of the redemption period mentioned in the notice published pursuant to sub. (6), or may serve a verified answer upon the county treasurer of such county, as provided in sub. (7). The caption of such answer shall contain a reference to the number or numbers of the parcels concerned as shown by the treasurer's list. Such answer must be served on said county treasurer and filed in the office of the clerk of the circuit court within 30 days after the date mentioned in the notice published pursuant to sub. (6), as the last day for redemption. In the event of the failure to redeem or answer by any person having the right to redeem or answer within the time herein limited, such person, and all persons claiming under and through that person, from and after the date of the filing of said list of tax liens with the clerk of the circuit court, shall be forever barred and foreclosed of all his or her right, title and interest in and to the parcel described in such list of tax liens and a judgment in foreclosure may be taken as herein provided. Upon redemption as permitted by this section, the person redeeming shall be entitled to a certificate evidencing such redemption from the county treasurer of such county, describing the property in the

same manner as it is described in such list of tax liens and the fact of such redemption shall be noted upon the tax rolls in the office of the county treasurer, who shall file a certified copy of such redemption certificate with the clerk of the circuit court and upon such filing, such clerk shall note the word "Redeemed" and the date of such filing opposite the description of said parcel on such list of tax liens. Such notation shall operate to cancel the notice of pendency of proceeding with respect to such parcel or such portion thereof. The person so redeeming shall be entitled to add the amount paid in redemption to the face amount of any lien which the person may have against said lands and to have interest thereon until paid.

(6) Public notice of in rem proceeding. Upon the filing of such list in the office of the clerk of the circuit court, the county treasurer forthwith shall prepare a notice that such list of tax liens and petition has been so filed and a copy thereof posted in the office of said county treasurer. The treasurer shall cause such notice, together with the list of tax liens and petition, to be published as a class 3 notice, under ch. 985. Such notice shall be in substantially the following form:

NOTICE OF COMMENCEMENT OF PROCEEDING IN REM TO FORECLOSE TAX LIENS

BY _____ COUNTY

(Here insert list of tax liens and petition as filed in office of clerk of the circuit court.)

Take notice That all persons having or claiming to have any right, title or interest in or lien upon the real property described in the list of tax liens, No. ____, on file in the office of the clerk of the circuit court of ____ county, dated ____, and hereinabove set forth, are hereby notified that the filing of such

list of tax liens in the office of the clerk of the circuit court of ____ county constitutes the commencement by said ____ county of a special proceeding in the circuit court for ____ county to foreclose the tax liens therein described by foreclosure proceeding in rem and that a notice of the pendency of such proceeding against each piece or parcel of land therein described was filed in the office of the clerk of the circuit court on ____ (insert date). Such proceeding is brought against the real property herein described only and is to foreclose the tax liens described in such list. No personal judgment will be entered herein for such taxes, assessments or other legal charges or any part thereof.

Take further notice That all persons having or claiming to have any right, title or interest in or lien upon the real property described in said list of tax liens are hereby notified that a certified copy of such list of tax liens has been posted in the office of the county treasurer of ____ county and will remain posted for public inspection up to and including ____ (here insert date at least 8 weeks from the date of the first publication of this notice) which date is hereby fixed as the last day for redemption.

Take further notice That any person having or claiming to have any right, title or interest in or lien upon any such parcel may, on or before said ____ (insert redemption final date), redeem such delinquent tax liens by paying to the county treasurer of ____ county, the amount of all such unpaid tax liens and in addition thereto, all interest and penalties which have accrued on said unpaid tax liens, computed to and including the date of redemption, plus the reasonable costs that the county incurred to initiate the proceedings plus the person's share of the reasonable costs of publication under sub. (6).

_____ County

By _____ County Treasurer

(7) Right of person having an interest in or lien upon parcels described in list of tax liens, to answer petition.

(a) Every person having any right, title or interest in or lien upon any parcel described in such list of tax liens, may serve a duly verified answer upon the county treasurer for such county, setting forth in detail, the nature and amount of that person's interest and objecting to the proposed foreclosure upon one or more of the following grounds only:

1. That the lands in which such person is interested, described in such list of tax liens, were not liable to taxation, special assessment, special charge or special tax at the time the tax, special assessment, special charge or special tax for the nonpayment of which the tax lien arises, was levied.

2. That the tax, special assessment, special charge or special tax for the nonpayment of which said tax lien arises, was in fact paid before the last day of the redemption period provided by law.

3. That the tax lien is barred by the statute of limitations.

(b) No other defense to the petition of said county set forth in such tax list, shall be set up. Such answer must be filed in the office of the clerk of the circuit court and served upon the county treasurer of such county within 30 days after the date hereinabove mentioned, as the last date for redemption.

(8) Duty of the court to enter judgment in default cases. In the event of the failure to redeem or answer by any person having the right to redeem or answer as hereinabove provided, such person and all persons claiming under and through that person, from and after the date of the filing of the list of tax

liens in the office of the clerk of the circuit court of the county, shall be forever barred and foreclosed of all right, title and interest and equity of redemption in and to the parcel described in such list of the tax liens, and upon filing of an affidavit of such default or failure of redemption by the county treasurer of such county, the court in which such list of tax liens is filed, shall render final judgment ordering and adjudging that the county is vested with an estate in fee simple absolute in such lands, subject, however, to all unpaid taxes and charges which are subsequent to the latest dated valid tax lien appearing on the list specified in sub. (3) (b) and to recorded restrictions as provided by s. 75.14 (4) and all persons, both natural and artificial, including the state of Wisconsin, infants, incompetents, absentees and nonresidents who may have had any right, title, interest, claim, lien or equity of redemption in such lands, are forever barred and foreclosed of such right, title, interest, claim, lien or equity of redemption. Such judgment shall be deemed to be based on the latest dated valid tax lien appearing on the list of tax liens. No personal judgment shall be entered against any person having or claiming to have any right, title or interest in or lien upon said lands. Such judgment shall have the effect of the issuance of a tax deed or deeds and of judgment to bar former owners and quiet title thereon.

(9) Filing of affidavit. All affidavits of filing, publication, posting, mailing or other acts required by this section, shall be made by the person performing such acts and shall be filed in the office of the clerk of the circuit court of the county in which the property subject to such tax lien is situated and shall, together with all other documents required in this section, filed in such office, constitute and become part of the judgment roll in such foreclosure proceeding.

(10) Contested issues and trial thereof. If a duly verified answer is served upon the county treasurer within the period

mentioned in sub. (7), the court shall hear and determine the issues raised by the petition and answer in the same manner and under the same rules as it hears and determines civil actions, except as in this section otherwise provided. Upon such trial, proof that such tax, special assessment, special charge or special tax, together with any interest or penalty which may have been due was paid, or that the property was not subject to tax, special assessment, special charge or special tax, or that such tax lien is barred by the statute of limitations, shall constitute a complete defense. Whenever an answer is interposed as herein provided, there shall be a severance of the proceeding as to any parcel or parcels of land in which such answering defendant has any right, title or interest as alleged in his or her answer, and as to the other parcels in such list, the proceeding shall proceed as provided in sub. (8).

(11) Preference over other proceedings and actions. Any proceeding brought pursuant to this section shall be given preference over all other causes and actions not on trial and no such proceeding shall be referred.

(12) Presumptions of validity; guardian ad litem.

(a) The county need not plead or prove the various steps, proceedings and notices for the assessment and levy of the taxes, assessments or other lawful charges against the lands set forth in the list of tax liens and all such taxes, assessments or other lawful charges and the lien thereof shall be presumed to be valid. A defendant alleging any jurisdictional defect or invalidity in the tax, special assessment, special charge or special tax, because of which said land was not liable to taxation, special assessment or other lawful charge, must particularly specify in the defendant's answer such jurisdictional defect or invalidity and must affirmatively establish such defense.

(b) This section shall apply to and be valid and effective with respect to all defendants even though one or more be infants, incompetents, absentees or nonresidents of the state of Wisconsin, provided that a guardian ad litem shall be appointed to serve for all persons known or unknown who have or may have an interest in the lands described in any list and who are or may be minors or incompetents at the date of filing such list. Such guardian ad litem may be appointed by the court without notice, and the fee for the services of the guardian ad litem as fixed by the court shall be paid by the county.

(13) Judgment, contents.

(a) Where, as to any parcel in the list of tax liens, an answer has been interposed by a party and the court shall determine in favor of such party upon such answer, the court shall make a final judgment divesting said parcel of the lien alleged to have accrued against same.

(b) In the event that the court shall determine that the issue raised by the answer of the defendant is without merit, a final judgment to such effect shall be entered ordering and adjudging that the county is vested with an estate in fee simple absolute in such lands subject, however, to all unpaid taxes and charges which are subsequent to the latest dated tax lien appearing on the list specified in sub. (3) (b) and to recorded restrictions as provided by s. 75.14, and all persons, both natural and artificial, including the state of Wisconsin, infants, incompetents, absentees and nonresidents who may have had any right, title, interest, claim, lien or equity of redemption in such lands, are forever barred and foreclosed of such right, title, interest, claim, lien or equity of redemption. Such judgment shall be deemed to be based on the latest dated tax lien appearing on the list of tax liens. Such judgment shall have

the effect of the issuance of a tax deed or deeds and of judgment to bar former owners and quiet title thereon.

(14) Judgment to be recorded. A certified copy of the judgment of the court in both default and contested cases shall be recorded by the prevailing party in the office of the register of deeds of such county.

(14a) Damages. Any person who was the owner of any right, title or interest in land which was lost by judgment of foreclosure as provided in this section may within 2 years from the date of entry of such judgment, in the cases hereinafter mentioned other than fraud and within 6 years in the case of fraud, commence an action in the circuit court against the county to recover the fair market value of the person's interest therein at the date of entry of said judgment of foreclosure in rem. If the court determines that such person's right, title and interest in said land was unjustly foreclosed and lost because said person's interest in such lands was not subject to taxation, special assessment, special charge or special tax at the time of the levy of the tax, assessment or charge, for nonpayment of which said lands were foreclosed, or that in fact such tax, special assessment, special charge or special tax was paid by said owner, or that the tax lien upon which the judgment of foreclosure in rem was based was barred by the statute of limitations, or if such person lost said property through fraud without fault on his or her part, the court shall determine the fair market value of said land or of said person's interest therein as hereinabove set forth. The fair market value shall not exceed the amount arrived at by dividing the assessed valuation of such lands in the year in which such judgment in rem was entered by the percentage ratio of real estate assessments prevailing for the taxing district in which the lands were located as set forth in the equalization for state tax purposes of the same year. The court shall award judgment to such plaintiff in such amount, together with reasonable

attorney fees to be fixed by the court, and the plaintiff's costs and disbursements of such action. The amount awarded the plaintiff shall be reduced by the total amount due, as of the date of entry of such judgment, for all current taxes and upon all tax certificates held by the county on such date that the court shall find were valid. Upon payment of the judgment the county may charge back as a tax to any taxing district the amount which such district received from the county in payment of taxes and interest on said land either by distribution of proceeds of sale thereof by the county or through other payment by the county to the extent that it exceeds the amount distributable to such district had the same been based upon the payment of the taxes and interest found by the court to be properly payable at the time of the entry of the judgment of foreclosure and applied in reduction of the amount awarded to the plaintiff hereunder.

Wisconsin Statute Section 801.58
Substitution of judge

(1) Any party to a civil action or proceeding may file a written request, signed personally or by his or her attorney, with the clerk of courts for a substitution of a new judge for the judge assigned to the case. The written request shall be filed preceding the hearing of any preliminary contested matters and, if by the plaintiff, not later than 60 days after the summons and complaint are filed or, if by any other party, not later than 60 days after service of a summons and complaint upon that party. If a new judge is assigned to the trial of a case, a request for substitution must be made within 10 days of receipt of notice of assignment, provided that if the notice of assignment is received less than 10 days prior to trial, the request for substitution must be made within 24 hours of receipt of the notice and provided that if notification is received less than 24 hours prior to trial, the action shall proceed to trial only upon stipulation of the parties that the assigned judge may preside at the trial of the action. Upon filing the written request, the filing party shall forthwith mail a copy thereof to all parties to the action and to the named judge.

(2) When the clerk receives a request for substitution, the clerk shall immediately contact the judge whose substitution has been requested for a determination of whether the request was made timely and in proper form. If the request is found to be timely and in proper form, the judge named in the request has no further jurisdiction and the clerk shall request the assignment of another judge under s. 751.03. If the judge named in the substitution request finds that the request was not timely and in proper form, that determination may be reviewed by the chief judge of the judicial administrative district, or by the chief judge of an adjoining judicial administrative district if the judge named

in the request is the chief judge, if the party who made the substitution request files a written request for review with the clerk no later than 10 days after the determination by the judge named in the request. If no determination is made by the judge named in the request within 7 days, the clerk shall refer the matter to the chief judge of the judicial administrative district or to the chief judge of an adjoining judicial administrative district, if the judge named in the request is the chief judge, for determination of whether the request was made timely and in proper form and reassignment as necessary. The newly assigned judge shall proceed under s. 802.10 (1).

(3) Except as provided in sub. (7), no party may file more than one such written request in any one action, nor may any single such request name more than one judge. For purposes of this subsection parties united in interest and pleading together shall be considered as a single party, but the consent of all such parties is not needed for the filing by one of such party of a written request.

(4) Upon the filing of an agreement signed by all parties to a civil action or proceeding, by the original judge for which a substitution of a new judge has been made, and by the new judge, the civil action or proceeding and pertinent records shall be transferred back to the original judge.

(5) In addition to other substitution of judge procedures, in probate matters a party may file a written request specifically stating the issue in a probate proceeding for which a request for substitution of a new judge has been made. The judge shall thereupon be substituted in relation to that issue but after resolution of the issue shall continue with the administration of the estate. If a person wishes to file a written request for

substitution of a new judge for the entire proceeding, subs. (1) to (4) shall apply.

(6) (a) In probate matters ss. 801.59 to 801.62 apply, except that upon the substitution of any judge, the case shall be referred to the register in probate, who shall request assignment of another judge under s. 751.03 to attend and hold court in such matter. (b) Ex parte orders, letters, bonds, petitions and affidavits may be presented to the assigned judge, by mail or in person, for signing or approving, wherever the judge may be holding court, who shall execute or approve the same and forthwith transmit the same to the attorney who presented it, for filing with the circuit court of the county where the records and files of the matter are kept.

(7) If upon an appeal from a judgment or order or upon a writ of error the appellate court orders a new trial or reverses or modifies the judgment or order as to any or all of the parties in a manner such that further proceedings in the trial court are necessary, any party may file a request under sub. (1) within 20 days after the filing of the remittitur in the trial court whether or not another request was filed prior to the time the appeal or writ of error was taken.

Wisconsin Statute Section 806.07
Relief from judgment or order

(1) On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons: (a) Mistake, inadvertence, surprise, or excusable neglect; (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15 (3); (c) Fraud, misrepresentation, or other misconduct of an adverse party; (d) The judgment is void; (e) The judgment has been satisfied, released or discharged; (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated; (g) It is no longer equitable that the judgment should have prospective application; or (h) Any other reasons justifying relief from the operation of the judgment.

(2) The motion shall be made within a reasonable time, and, if based on sub. (1) (a) or (c), not more than one year after the judgment was entered or the order or stipulation was made. A motion based on sub. (1) (b) shall be made within the time provided in s. 805.16. A motion under this section does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud on the court.

(3) A motion under this section may not be made by an adoptive parent to relieve the adoptive parent from a judgment or order under s. 48.91 (3) granting adoption of a child. A petition for termination of parental rights under s. 48.42 and an appeal to the court of appeals shall be the exclusive remedies for an adoptive parent who wishes to end his or her parental relationship with his or her adoptive child.